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No.

IN THE

Supreme Court Of The United States

October Term, 1990

MARVIN L. WARNER and DAVID J. SCHIEBEL,
Petitioners,

v.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

ROGER J. MAKLEY
JANICE PAULUS
COOLIDGE, WALL,
WOMSLEY & LOMBARD
600 IBM Building
33 W. First Street
Dayton, Ohio 45402
(513) 223-8177

Attorneys for Petitioner
David J. Schiebel

LAWRENCE HERMAN
1659 N. High Street
Columbus, Ohio 43210
(614) 292-6691

LOUIS A. JACOBS
4905 Green Acres Drive
Columbus, Ohio 43220
(614) 459-5690

Of Counsel

HERBERT J. MILLER, JR.
WILLIAM H. JEFFRESS, JR.
(Counsel of Record)
JULIA E. GUTTMAN
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner
Marvin L. Warner

BOBBY LEE COOK
COOK & PALMOUR
128 South Commerce Street
Summerville, Georgia 30747
(404) 857-3421

Of Counsel

Balmar Legal Publishing Division, Washington, D.C. 20005 (202)659-3610

QUESTIONS PRESENTED

1. May a state avoid *Sandstrom v. Montana*'s rule against mandatory irrebuttable presumptions in criminal cases by characterizing such a presumption as a "definition" of an element of the offense?

2. Should a state court be permitted to avoid this Court's review of a constitutional question by an alternative finding of harmlessness, when the state never argued that the error was harmless and the evidence, the verdicts, and the prosecutor's arguments at trial demonstrate the contrary? May a mandatory irrebuttable presumption be found harmless beyond a reasonable doubt where the facts the jury was required to find are not functionally equivalent to the ultimate fact that the jury was erroneously instructed to presume?

3. Where a trial court violates the Sixth and Fourteenth Amendment rights of a defendant by providing the jury with written instructions that are not disclosed to the defense, may an appellate court uphold the conviction without determining the error to be harmless beyond a reasonable doubt?

4. Where a defendant is indicted and tried on a charge, in accordance with prior judicial interpretation of the statute, that he acted knowingly and intentionally, is the defendant denied due process when the mens rea is reduced to "recklessness" after the state's evidence fails to establish knowledge by the defendant?

5. Is exclusive reliance on potential jurors' responses during voir dire adequate to protect a defendant's right to an impartial jury where the events at issue have had a direct and widespread financial impact on the citizens of the county of trial, and have generated intense hostility toward the defendant?

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OPINIONS BELOW

The opinion of the Ohio Supreme Court in *State v. Warner* (Pet. App. A) is reported at 55 Ohio St. 3d 31, 564 N.E.2d 18. The opinion of the Ohio Supreme Court in *State v. Schiebel* (Pet. App. B) is reported at 55 Ohio St. 3d 71, 564 N.E.2d 54. The opinion of the Hamilton County Court of Appeals reversing the convictions (Pet. App. C) is unreported. The opinions of the Hamilton County Court of Appeals reversing the denial of leave to file motions for a new trial (Pet. App. D, E) are unreported. The decisions of the trial court granting the motions to correct the record (Pet. App. F, G) are unreported. The trial court decisions denying leave to file motions for new trial (Pet. App. H, I) are also unreported.

JURISDICTION

The opinions and judgments of the Ohio Supreme Court were entered October 26, 1990 (Pet. App. A, B). Timely motions for rehearing by both petitioners were denied on November 23, 1990 (Pet. App. J, K, L, M). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Ohio Revised Code § 1707.44(B)(4) provides as follows:

> No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes:
>
> * * *
>
> (4) Seiling any securities in this state.

Ohio Revised Code § 1707.44(G) provides as follows:

> No person in selling securities shall knowingly engage in any act or practice which is, in sections 1707.01 to 1707.45 of the Revised Code, declared illegal, defined as fraudulent, or prohibited.

Ohio Revised Code § 1707.44(J) provides as follows:

> No person, with purpose to deceive, shall make, issue, publish, or cause to be made, issued, or published any statement or advertisement as to the value of securities, or as to alleged facts affecting the value of securities, or as to the financial condition of any issuer of securities, when such person knows that such statement or advertisement is false in any material respect.

Ohio Revised Code § 2901.22 provides in relevant part as follows:

> A person has knowledge of circumstances when he is aware that such circumstances probably exist.

Ohio Revised Code § 1707.29 provides in relevant part as follows:

> *Presumption of Knowledge.*
>
> In any prosecution brought under sections 1707.01 to 1707.45 of the Revised Code, . . . the accused shall be deemed to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge.

Ohio Revised Code § 1153.01 provides as follows:

> No president, director, trustee, committee member, secretary, treasurer, attorney, or other officer or agent of a building and loan association shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association; nor shall he issue or put into circulation a warrant or other order, or assign, transfer, cancel, or deliver a note, bond, draft, mortgage, judgment, decree, or other written instrument belonging to the association, or raise or receive money for and in the name of such association, unless authorized to do so by its board of directors.

STATEMENT

1. Summary Of Proceedings In The Ohio Courts

Petitioner Marvin Warner was the owner of Home State Savings Bank of Cincinnati, and petitioner David Schiebel was an officer of that bank. Home State was the largest victim of a massive fraud on customers by ESM Government Securities Inc., which involved among other things the bribery of a partner in the accounting firm of Alexander Grant & Co. to issue false financial statements for ESM. When ESM's fraud and insolvency was revealed in March 1985, Home State was threatened with the loss of over $100 million in U.S. government securities supposedly held by ESM as collateral under repurchase agreements. This threatened loss caused the immediate collapse of Home State. Further, because the loss exceeded the assets of the Ohio Deposit Guaranty Fund, which insured deposits at almost 70 savings and loan associations in Ohio, Home State's collapse led to a panic among depositors; an order by the Governor temporarily closing all ODGF-insured institutions; freezing of the funds of hundreds of thousands of depositors; depositor marches on the State Capitol; numerous special acts of the legislature, including the appointment of a special Home State criminal prosecutor; a celebrated legislative investigation; and an enormous financial and political crisis in Ohio.

Although petitioner Warner had not been an officer or director of Home State since he resigned to serve as the U.S. Ambassador to

Switzerland in 1977, he was its sole owner in 1985, and had been a prominent figure in political and financial circles in Ohio for many years. Warner became the focus of much of the depositor outrage and hostile publicity in the wake of the crisis. In December 1985, he was indicted by the Special Prosecutor, along with petitioner Schiebel and a former president of Home State, Burton Bongard. The charges involved transfers by Home State of over $300 million in response to margin calls by ESM on Home State's account during May-October 1983, which were alleged both to be willful misapplications of the bank's funds (41 counts) and to be unauthorized by Home State's board of directors (41 counts); and disclosure materials issued in connection with Home State's sale of debentures in 1984, which were alleged to be fraudulent (3 counts).

Before trial in the Hamilton County Court of Common Pleas, the defendants moved for a change of venue, pointing out the high concentration in that county of enraged depositors at Home State and other institutions whose funds were frozen as a result of the Home State collapse; an avalanche of publicity highly unfavorable to the defendants; and professional opinion polls showing that 51% of Cincinnati residents knew someone who was personally affected by the Home State collapse, and 64% already had an opinion that Warner was probably guilty. A change of venue was nonetheless denied, and trial proceeded in Cincinnati in November 1986.

At trial, which was filmed for television, the prosecutor told the jury "[w]hat you have heard and witnessed is the saga perhaps of the greatest financial disaster in the history of this State," stating that not only Home State but "the system in Ohio virtually collapsed," and that "what this trial is designed to do is to seek the truth, to find out in large part who is responsible for the collapse . . . ." The trial lasted 15 weeks. Both Warner and Schiebel testified.

The jury acquitted Warner and Schiebel on *all* counts which, under the instructions given by the trial judge, required the jury to find knowing or intentional wrongdoing. The jury convicted Warner, however, on six counts of "unauthorized acts," as to which — in instructions strenuously disputed by the defense — the trial judge permitted conviction for recklessness. The jury also convicted Warner and Schiebel on three counts of securities fraud, as to which the jury was

told that the defendants were presumed to have had knowledge of the falsity of representations if they were negligent in failing to ascertain the true facts.[1] During the nine full days of deliberations it required to reach these verdicts, the jury had in its possession over 200 pages of written instructions that the trial judge would not allow the defense to see, despite repeated requests.

In a federal criminal prosecution based on the same conduct involved in this case, a change of venue was granted to the Eastern District of Michigan, where Warner, Schiebel and Home State were largely unknown. The case was tried for seven weeks in May and June of 1987. The jury acquitted Warner on all 15 counts after only three hours of deliberations.

Warner and Schiebel appealed their convictions, and also appealed the denial of a motion for leave to file a motion for new trial based upon misconduct of a juror. In February of 1989, the court of appeals reversed the trial court's denial of leave to file the motion for a new trial. In November 1989, the court of appeals reversed the convictions, finding error in some seven different respects. The Ohio Supreme Court accepted jurisdiction of the State's appeals from both decisions, and also of the petitioners' cross-appeals on certain other issues decided adversely to them by the court of appeals. On October 26, 1990, the Ohio Supreme Court[2] reversed the court of appeals in both cases and reinstated the convictions on all counts.

2. The Unauthorized Acts Counts

Although the offense of "unauthorized acts" has been a part of the Ohio criminal statutes since the 19th century, Warner and his

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[1] Codefendant Burton Bongard, who as president of Home State had managed the investments with ESM and – without Warner or Schiebel's knowledge – had received over $2 million in profits on very little investment through a personal account at ESM, was convicted on all counts against him, including the 41 counts of misapplication of funds that required a finding of wrongful intent. Bongard later dropped his appeal and testified for the government against Warner in the federal prosecution, where Warner was acquitted on all counts.

[2] Three Justices recused themselves and were replaced, pursuant to a provision of the Ohio Constitution, with judges of the courts of appeals selected by the Chief Justice. The opinions were authored by Justice Holmes (Warner) and Chief Justice Moyer (Schiebel). Each opinion incorporates by reference certain parts of the other opinion.

codefendants are apparently the only persons ever to have been charged with the offense. The statute of which "unauthorized acts" is a part, however, was interpreted by the Ohio Supreme Court early in this century to require, like its federal counterpart, an intent to injure or defraud the bank. Accordingly, each of the 41 unauthorized acts counts of the indictment charged that the petitioners transferred funds of Home State to ESM without authority of the board of directors, "with intent to injure or defraud" Home State.

The theory of the prosecution was that Home State's board of directors, in April 1983, had passed a resolution limiting collateralization on repurchase agreements to 105-110% of the amount financed, and that 41 margin payments were made thereafter to ESM at a time when collateralization exceeded those limits. The State's proof, however, failed to establish that Warner — who was neither a director nor an officer of Home State — was aware of the resolution in question. Accordingly, the State changed its position on the elements of the offense after its case was closed, and urged a mens rea of "recklessness" rather than knowledge or intent. The trial judge agreed and so instructed the jury, omitting any requirement of knowledge or of intent to defraud. Midway through the prosecutor's closing argument, the judge also switched positions and announced that ratification and acquiescence by the board of directors was not a defense. Both the court of appeals and the Ohio Supreme Court upheld these instructions, and rejected Warner's claim that he was deprived of due process of law when the mens rea of the charge was reduced after the evidence was in.[3]

3. The Securities Counts

As to the securities counts, the evidence established that Home State in the fall of 1984 sold $11 million of debentures pursuant to a brief "offering circular." The State contended that the circular overstated Home State's net worth, based upon an expert witness's testimony that reductions should have been made under generally accepted accounting principles in the carrying value of certain assets.

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[3] The Ohio Supreme Court in its opinion did not discuss the due process claim, nor even acknowledge the prosecution's shift from a contention of "knowing" misconduct to one of "reckless" conduct after completing its evidence. The issue was squarely raised by Mr. Warner both in the court of appeals (Sixth Assignment of Error, Issue I) and in the Supreme Court (Proposition of Law No. 5).

The evidence showed that neither Warner nor Schiebel prepared or gave any directions with respect to the financial statement: it was prepared by Home State's accounting personnel and reviewed by its outside auditors, Arthur Andersen & Co.

The State also contended, with respect to the securities counts, that the offering circular and the SEC disclosure statements incorporated by reference were misleading in that they misrepresented or failed to disclose various information concerning Home State's relationship with ESM, and failed to disclose the fact that the repurchase agreements had been severely criticized by bank examiners. These examination reports were not provided to Warner, and the examiners did not communicate their concerns to him.

Each of the securities offenses for which the petitioners were prosecuted punishes false or misleading representations made "knowingly," and the trial judge so instructed the jury. However, relying on Ohio Rev. Code § 1707.29 (entitled "Presumption of Knowledge"), the judge instructed the jury that the defendant "shall be deemed to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge." The instructions defined "reasonable diligence" as "such diligence, care or attention as might be expected from a person of ordinary prudence or activity [sic] under the same or similar circumstances." The petitioners objected to this mandatory presumption of knowledge from proof of simple negligence, contending that the instruction violated the Due Process Clause of the Fourteenth Amendment. The Ohio Supreme Court rejected the contention, reasoning that the instruction constituted a "definition" of knowledge rather than a "presumption" of knowledge.

4. The Written Instructions And The Belated "Correction" Of The Record

The content of the jury instructions was hotly disputed in numerous respects, beginning before trial and continuing through delivery of the oral charge. The judge decided to provide the jury a written set of his instructions, but despite repeated requests, he refused to show them to defense counsel. Counsel for Warner did learn, on the second day of deliberations, that the judge had apparently not included

some important instructions requested by the defense and delivered orally. The parties thereupon attempted to reconstruct these "supplemental" instructions, and the judge promised to insert them in the jury's book.[4] Thereafter, the defense filed a motion to disclose the written instructions as given to the jury, but the trial judge did not act upon it.

At sentencing, the trial judge announced that the notebook of written instructions was part of the record. Defense counsel thereupon inspected the book and discovered that the supplemental instructions were not included, and that the instructions contained numerous handwritten alterations, were out of sequence, and otherwise varied greatly from the instructions delivered orally. Counsel interviewed the jury foreman to determine whether the book accurately reflected what the jury had received. The foreman advised that it was accurate, and that no written instructions had been received other than those in the book. Accordingly, the written instructions were certified by the court reporter as the record on appeal, and the petitioners urged on appeal that the prejudicial variances between the oral and written instructions required reversal.

Over two years after the verdict, barely a month after the death of the jury foreman, and several months after the court reporter destroyed her notes,[5] the Special Prosecutor asked the trial court to "correct" the record on appeal, to reflect that the supplemental instructions had been typed by the reporter and delivered in writing to the jury by the trial judge's constable, Steven Donnellon. The State relied primarily on an affidavit of Donnellon stating that he had taken the supplemental instructions to the jury room, advised the assembled jurors what they were, and laid them on the table. The State also submitted what appeared to be drafts of three of the four instructions in dispute that it claimed were "among those" delivered by Donnellon to the jury. In response, the defense submitted affidavits of three jurors, an affidavit of counsel relating his contemporaneous interview of the

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[4] Counsel for Schiebel was not present during this conference. This fact alone, as to Schiebel, amounted to an independent violation of the right to be present at all critical stages of the trial.

[5] Petitioners' briefs in the court of appeals raising this issue were filed in June of 1988. The State did not move to "correct" the record until ten months later, in April of 1989.

jury foreman, and a proffer of the testimony of three other jurors, all of whom stated they were not aware of any instructions other than those in the book, and did not recall Constable Donnellon bringing any supplemental instructions to the jury room.

The trial judge granted the State's motion to correct the record.[6] The court of appeals reversed, finding no basis to conclude that the "duty to disclose" instruction was delivered in writing, and remanding for an evidentiary hearing on the question whether two other instructions were in fact received by the jury. The Ohio Supreme Court, however, overruled the court of appeals; it interpreted the Ohio rules of evidence to bar testimony of jurors that the supplemental written instructions were *not* received by them, but held the constable's affidavit that the instructions *were* delivered to be admissible and sufficient to support the trial court's order.

The Ohio Supreme Court agreed that the trial court's submission of written instructions to the jury, without disclosing those instructions to the defense, violated state and federal constitutional requirements. Based upon its affirmance of the order "correcting" the record, however, and upon a finding that other variations between the oral and written instructions were not prejudicial, the court held the error did not require reversal of the convictions. The court did not purport to follow the decisions of this Court holding that constitutional violations require reversal unless harmless beyond a reasonable doubt.

5. The Motion For A New Trial

Shortly after the sentencing, a juror revealed to Warner's wife that another juror, Larry Dalton, had said his mother-in-law had deposits at Home State, and had made derogatory remarks during the course of trial such as "I hate Marvin Warner." Since anyone related to a Home State depositor was disqualified to serve as a juror, and since Dalton on voir dire stated he knew no Home State depositors and had no opinions regarding Warner, counsel investigated and confirmed the allegations. Counsel also learned that a juror had

[6] This ruling was made in Warner's case by the Hon. Robert Ruehlman of the Court of Common Pleas after the trial judge, the Hon. Richard Niehaus, recused himself when faced with an evidentiary hearing ordered by a Justice of the Ohio Supreme Court on Warner's petition to disqualify him for bias and prejudice. The petition was based upon statements by Judge Niehaus during numerous radio and television appearances after the trial.

reported Dalton's comment about his mother-in-law to the constable, Steven Donnellon, within hours after the verdict was returned. Donnellon told the juror that this could cause a mistrial, yet Donnellon did not reveal the information to the defense or advise the juror to reveal it.

The Ohio Rules of Criminal Procedure require that motions for a new trial be filed within 14 days after the verdict unless the defendant shows that he was "unavoidably prevented" from filing the motion within that time. The petitioners learned the information concerning juror Dalton some thirty days after the verdict, and accordingly sought leave to file motions for a new trial outside the 14-day limit. The trial court denied leave to file. The court of appeals reversed, but the Ohio Supreme Court reinstated the trial judge's decision, finding that defense counsel should have interrogated jurors immediately after the verdict about possible misconduct by them or their jurymates, even though defense counsel had no notice of any misconduct and Constable Donnellon had withheld from the defense the information reported to him.

REASONS FOR GRANTING THE WRIT

The federal constitutional claims presented in this petition involve the integrity of the process by which the State of Ohio obtained the petitioners' criminal convictions. Where the events at issue engender enormous public outrage and hostility toward the defendants, and every judicial act is greeted with intense publicity and editorial comment, the system of justice in trial and appellate courts is most severely tested. When charges of fraud leading to the collapse of Home State were brought to trial in a federal court outside Ohio, Warner was acquitted on all counts. When similar charges were brought to trial in an Ohio court, in the community where victims of the collapse were most numerous and public hostility was most intense, Warner and Schiebel were nevertheless acquitted of all offenses as to which the jury was required to find knowing or intentional wrongdoing. That they were convicted at all was, we submit, made possible only by changing the rules for the purpose, in the words of the trial judge, of making it "easier to convict."

Although Warner was charged and tried for unauthorized acts done knowingly with intent to defraud, the trial judge eliminated those elements when the proof of knowledge fell short. And although the securities fraud offenses require knowing misrepresentations, the Ohio statutes were interpreted to require conviction of Warner and Schiebel for simple negligence. The defense was not allowed to inspect written instructions given to the jury, and more than two years after the verdict, the record of what these instructions contained was changed in order to permit affirmance of the convictions. In changing the record, the courts accepted an affidavit of a constable claiming that he delivered supplemental written instructions to jurors, yet refused to consider affidavits of the jurors denying it.

As is evident from the opinions of the courts below, the conduct of this prosecution raised numerous novel and important issues of substance and procedure beyond those presented in this petition. The issues presented herein are those that we submit individually warrant review under the standards of Rule 10.1(c) of the Rules of this Court. A common claim, however, and one abundantly demonstrated by the course of the trial and appellate proceedings, is that the Ohio courts failed to provide the petitioners with a fair adjudication of their guilt or innocence.

1. This Court Should Determine Whether The Rule Of *Sandstrom v. Montana* And Its Progeny May Be Circumvented By Characterizing A Mandatory, Conclusive Presumption As A "Definition" Of An Element Of The Offense

Whether a state may avoid this Court's prohibition on mandatory irrebuttable presumptions in criminal cases by characterizing such a presumption as a definition of an element of an offense is an important constitutional question that this Court should review. The Ohio Supreme Court acknowledged that each of the statutory securities offenses of which Warner and Schiebel were convicted explicitly required a mental state of knowledge. (Pet. App. A, p. 37).[7] Section

[7] Ohio Rev. Code § 1707.44(B)(4), the offense charged in Count 83, punishes only persons who "knowingly" make false representations. Section 1707.44(J), the offense charged in Count 85, forbids any statement concerning the value of securities

(continued)

1707.29 of the Ohio Revised Code, entitled "Presumption of Knowledge," provides:

> In any prosecution brought under [sections of the Ohio Revised Code involving securities offenses] . . . the accused shall be deemed to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge.

After instructing the jury that knowledge was an element of the securities offenses, the trial court, over defendants' objection, charged the jury in the language of Section 1707.29. He further defined "reasonable diligence" as simple negligence: "such diligence, care or attention as might be expected from a person of ordinary prudence...."

Where knowledge is the explicit mental state of an offense, an instruction that a defendant "shall be deemed to have had knowledge" upon proof of failure to exercise reasonable diligence to learn the facts relieves the prosecution of its burden of proof on an essential element of the offense, in violation of the Due Process Clause. *See Sandstrom v. Montana*, 442 U.S. 510 (1979); *see also Carella v. California*, 491 U.S. 263, 109 S. Ct. 2419 (1989); *Francis v. Franklin*, 471 U.S. 307 (1985). Although *Sandstrom* involved a common-law presumption, nothing in this Court's jurisprudence of burden-shifting presumptions hinges on whether the presumption is created by a legislature or by a court. If a presumption has the effect condemned by *Sandstrom*, it is unconstitutional even though created by statute. *See Carella v. California, supra* (statutory presumption held unconstitutional).

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by any person who "knows" the statement is materially false. Section 1707.44(G), the offense charged in Count 86, prohibits sellers of securities from "knowingly" engaging in illegal acts or practices.

Ohio has adopted a modified version of the four-part culpability structure of the Model Penal Code. An accused is not guilty of a criminal offense unless "[h]e has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense." *See* Ohio Rev. Code § 2901.21(A)(2). Culpability "means purpose, knowledge, recklessness, or negligence, as defined in Section 2901.22 of the Revised Code." *See* Ohio Rev. Code § 2901.21(C)(3). That section provides that a person acts knowingly or has knowledge when he "is aware" that circumstances probably exist. *See* Ohio Rev. Code § 2901.22.

Reasonable jurors would have understood the challenged instructions to require them to find the element of knowledge satisfied upon proof of simple negligence. *See Carella v. California*, 109 S. Ct. at 2420. The jury was not told that it *might infer* knowledge; it was told to find criminal liability once it found that the defendants through reasonable diligence should have learned the facts. As in *Carella v. California*, "[t]hese mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses with which [the defendant] was charged." 109 S. Ct. at 2420.

The Ohio Supreme Court did not deny that the instruction to the jury was mandatory, but reasoned that the instruction was not governed by *Sandstrom* because the intent of Section 1707.29 was to "in effect" define the knowledge requirement in the statutory securities offenses to include negligent failure to learn the facts.[8] The court found that Section 1707.29 did not impermissibly shift the burden of proof to the defendants, because the only proof required was that the defendants represented facts to be different than they should have known them to be in the exercise of reasonable diligence, and the burden of proving this fact was on the State.

If this analysis is allowed to stand, it will undermine the entire line of cases beginning with *Sandstrom*. The very nature of a mandatory irrebuttable or conclusive presumption is to remove the presumed element as an ingredient of the offense and to require the state to prove only the predicate fact. As this Court has explained, "[a]n *irrebuttable* presumption, of course, does not shift any burden to the defendant; it eliminates an element from the case if the State proves the requisite predicate facts." *Francis v. Franklin*, 471 U.S. 307, 318 n.5 (1985). *See also United States v. United States Gypsum*, 438 U.S. 422, 446 (1978). A statutory presumption, therefore, can always be characterized as a "definition" of the element of the offense to include nothing more than the predicate fact that triggers the presumption. This Court has previously indicated that a federal court may not sustain

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[8] Notably, however, Section 1707.29 is phrased as a counterfactual statement – "the accused shall be deemed *to have had* knowledge . . . where, in the exercise of reasonable diligence, he *should* . . . *have* secured such knowledge" – expressly recognizing that an accused does not actually have knowledge under such circumstances.

an unconstitutional presumption on the ground that the legislature might have made it a crime to commit the basic act set forth in the presumption. *See Leary v. United States*, 395 U.S. 6, 37 (1969); *see also Tot v. United States*, 319 U.S. 463, 472 (1943).[9] If the Ohio Supreme Court's analysis is allowed to stand, however, state courts will be able to circumvent *Sandstrom* by the simple expedient of characterizing a statutory presumption as a definition.[10] Whether they should be allowed to do so is an important constitutional question that this Court should decide.

2. This Court Should Grant Review And Clarify The Scope Of Harmless Error Analysis As Applied To Mandatory Conclusive Presumptions

Assuming that a state may not circumvent *Sandstrom* by characterizing a presumption as a definition, the issue of harmless error must be resolved. The Ohio Supreme Court addressed this issue in the alternative, concluding that even if the Section 1707.29 presumption of knowledge impermissibly shifted the burden of proof on an

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[9] In *Leary*, a case involving a due process challenge to a permissive inference, this Court noted that it was required to "take the statute at face value" and determine whether it permitted conviction upon insufficient proof of the ultimate element of knowledge, rather than inquiring whether the legislature might have made the predicate act itself a crime. 395 U.S. at 37. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 517 (1979) ("the common definition of 'presume' [is] 'to suppose to be true without proof'").

[10] In *Sandstrom*, this Court condemned an instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 422 U.S. at 513. Although it did not do so, the Montana Supreme Court might have concluded that the instruction was merely a *definition* of intent: one intends to bring about a result whenever the result is an "ordinary consequence of his voluntary acts." Similarly, in *Carella*, the mens rea of the crime was intent to defraud, and the judge instructed the jury, as provided by statute, that "[i]ntent to commit theft by fraud is presumed if one who has leased or rented the personal property of another . . . fails to return the personal property to its owner within 20 days after the owner has made written demand . . . ." 109 S. Ct. at 2420. Although the California appellate court did not do so, it might have reasoned that the instruction was merely a *definition* of intent to defraud: intent exists whenever the lessee fails to return the property within 20 days after written demand. In either case, the instruction has the same effect of removing the element of intent from the case and limiting the jury to considering only whether the state had proved the predicate fact from which intent would be presumed. Yet under the reasoning of the Ohio Supreme Court, in one case the instruction would be constitutional, in the other case unconstitutional.

essential element of the offense, any error in the instructions was harmless. That contention was *never even advanced by the State* at any stage of the proceedings.

The court based its harmless error conclusion on a cursory characterization of the evidence in the case, commenting that Warner's actions were "calculated and deceitful." It disregarded the defendants' testimony, overlooked the prosecutor's repeated emphasis in closing argument on the "reasonable diligence" standard,[11] and ignored the defendants' acquittal by the jury on *every* count as to which a finding of specific intent was required. The court, moreover, did not rest its finding on an analysis of the jury instructions to determine what facts the jury was actually instructed to find. In this case, the presumed fact of knowledge is not functionally equivalent to the fact the jury was instructed to find, *i.e.*, what a person "should have learned in the exercise of reasonable diligence." It therefore cannot fairly be concluded by any standard, much less beyond a reasonable doubt, that the jury necessarily found that the defendants acted with knowledge.

The question of the focus of the harmless error inquiry permitted when a jury has been instructed conclusively to presume an element

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[11] The prosecutor began his argument on the securities counts as follows (t.p. 11120-21):

> Now the standard which Judge Niehaus, I believe will charge you on, in terms of how you must look at the conduct of defendant Warner and defendant Schiebel, with regard to the sales of these debentures, it is essentially based upon this standard that a person is liable if he represents facts to be different than he should have known them to be, if he had exercised reasonable diligence to ascertain the facts. Okay?
>
> It's the standard where it is a question of the person's knowledge. But, in addition to that knowledge, it is a question of what the person should have known in the exercise of reasonable diligence.

Later, speaking of claimed omissions as to market value of securities in the offering circular, the prosecutor asked the jury: "Is that something they knew or by reasonable diligence should have known?" (T.p. 11141.) Shortly afterward, the prosecutor repeated the thought: "Were they reasonably diligent in trying to determine what they should have put in here?" (T.p. 11141.) At the end of his argument, the prosecutor once again drove home the point (t.p. 11147-48):

> You pay close attention as Judge Niehaus reads the instructions about what knowledge is because it includes what they should have known, what they should have known by the exercise of reasonable diligence.

of the offense upon proof of a different fact, and the question of whether harmless error analysis even applies when there is a failure to instruct a jury to find each essential element of an offense, have divided the lower courts. *Compare United States v. Mentz*, 840 F.2d 315, 323-24 (6th Cir. 1988); *United States v. Voss*, 787 F.2d 393, 397-400 (8th Cir.), *cert. denied*, 479 U.S. 888 (1986) *with United States v. Kerley*, 838 F.2d 932, 937-39 (7th Cir. 1988), *opinion modified on other grounds*, 838 F.2d at 941; *United States v. North*, 910 F 2d 843, 892-94 (D.C. Cir. 1990); *but see id.* at 956-58 (Silberman, J., dissenting in part). *See also Teel v. Tennessee*, 59 U.S.L.W. 3404 (U.S., Dec. 3, 1990) (No. 90-5887) (White, J., dissenting from denial of certiorari, joined by Marshall, J.); *Hill v. Maloney*, No. 90-1294 (1st Cir. Nov. 21, 1990) (noting uncertainty of issue).

This conflict stems from a tension between this Court's holdings in *Rose v. Clark*, 478 U.S. 570 (1986), and *Carella v. California*, 491 U.S. 263, 109 S. Ct. 2419 (1989). *See also Pope v. Illinois*, 481 U.S. 497, 502-03 (1987); *cf. Osborne v. Ohio*, 110 S. Ct. 1691, 1705 (1990) (Blackmun, J., concurring); *id.* at 1716-17 (Brennan, J., dissenting, joined by Marshall and Stevens, JJ.). This Court should grant review to clarify that the harmless error inquiry permitted by *Carella v. California* in instances of mandatory conclusive presumptions focuses on whether the facts the jury was actually required to find — the "predicate facts" — conclusively establish the presumed fact, so that no rational jury that found the *predicate* facts could have failed to find the *ultimate* fact.[12] The alternative harmless error inquiry described in *Rose v. Clark*, in which a court undertakes its own assessment of the evidence to determine the existence of the element of the offense, should not be applied in assessing the harmlessness of a mandatory *irrebuttable* presumption.[13]

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[12] Harmless error can be found only "[w]hen the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings . . . functionally equivalent to finding the element required to be presumed." *See Carella*, 109 S. Ct. at 2423 (Scalia, J., concurring).

[13] Indeed, this Court "has held it irrelevant in analyzing a mandatory presumption . . . that there is ample evidence in the record other than the presumption to support a conviction." *Ulster County Court v. Allen*, 442 U.S. 140, 160 (1979). Such an (continued)

This Court heard argument on January 8, 1991, in *Yates v. Evatt*, No. 89-7691, on whether a mandatory *rebuttable* presumption constituted harmless error. By granting a writ of certiorari, this Court recognized the need to clarify an aspect of harmless error doctrine not fully addressed in its precedent. While the scope of harmless error inquiry applicable to a *rebuttable* presumption is in many respects a distinct issue, since the presumed element has not been entirely removed from the jury's consideration, depending on the scope of this Court's decision on the merits, *Yates v. Evatt* may clarify the application of harmless error analysis even to conclusive presumptions and confirm that the Ohio Supreme Court's harmless error analysis was constitutionally defective.[14]

3. The Ohio Supreme Court's Failure To Apply The Constitutional Test Of Harmless Error To The Trial Court's Refusal To Disclose The Written Jury Instructions Plainly Violates Decisions Of This Court

The Ohio Supreme Court agreed that the refusal of the trial court to allow the defense to inspect written instructions to the jury, which exceeded 200 pages and which were used by the jurors during nine days of deliberations to reach their verdicts, denied the defendants their state and federal constitutional right to be present at all critical stages of their trial. The court held (Pet. App. B, p. 23): "A criminal defendant has a right to be aware of all communications with the jury, including any written jury instructions that are taken into the jury room for deliberations." That principle is firmly established, under the Fifth and Sixth Amendments, by decisions of this Court. *Rushen v. Spain*, 464 U.S. 114, 117 (1983); *Rogers v. United States*, 422 U.S. 35 (1975); *accord, e.g., United States v. Treatman*, 524 F.2d 320, 323 (8th Cir. 1975); *United States v. Schor*, 418 F.2d 26, 29-30 (2d Cir. 1969).

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approach would deprive a defendant of the constitutional guarantee of a jury trial in a criminal case. *See Dunn v. United States*, 442 U.S. 100, 106-07 (1979); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 408-09 (1947); *Bollenbach v. United States*, 326 U.S. 607, 614 (1946); *see also Osborne v. Ohio*, 110 S. Ct. 1691, 1703-05 (1990).

[14] Petitioner in *Yates* acknowledged that this Court need not decide in that case the issue framed in Justice Scalia's concurrence in *Carella*, *see* Br. for Petitioner at 36, although the State of California filed an amicus brief specifically asking this Court to clarify the issue.

Having concluded that the defendants were denied their constitutional right to see the instructions, the court was obligated to reverse the convictions unless the error was harmless beyond a reasonable doubt. *Rushen v. Spain, supra.* The Ohio Supreme Court did not even purport to apply this standard. Rather, it concluded reversal was not required because it found "no prejudice from the inability of defendants to inspect the written instructions." (Pet. App. B, p. 23.) In their motions for rehearing, the petitioners pointed out that the failure to apply the test of harmlessness beyond a reasonable doubt violated federal constitutional requirements. (Warner Motion for Rehearing, pp. 18-25.) The court, however, denied rehearing without comment on this issue. The Ohio Supreme Court's failure to conform with the law established by this Court's prior decisions warrants review and reversal by this Court.

The Ohio Supreme Court's conclusion that no prejudice had been shown rested on two lines of analysis that are plainly inadequate under the constitutional test of harmless error.

The first finding involves the contention that three instructions requested by the defense and given orally were omitted from the written charge. The Court stated that this argument was "defeated by the trial court's order correcting the record" to reflect that these instructions were delivered to the jury in writing by Constable Donnellon. (Pet. App. B, p. 23.) In upholding a correction of the record made more than two years after the verdict, the court applied an "abuse of discretion" test to the trial court's order, a test that, it explained, requires that the trial court's actions "reflect an attitude which was unreasonable, arbitrary or unconscionable." (Pet. App. A, p. 25.) It accepted a constable's affidavit that he delivered supplemental instructions to the jury room, yet refused to consider the affidavits of three jurors[15] – and proffers of testimony of three others – that they never received any such instructions. That curious result was based upon the court's interpretation of the Ohio rule of evidence prohibiting jurors from giving testimony to impeach their verdict.[16]

[15] The court's opinion erroneously states that two jurors submitted affidavits (Pet. App. B, p. 18). Warner submitted affidavits of three jurors (Lafkas, Brady and Moore).

[16] Because the juror affidavits testified only to what was before them during deliberations, rather than the effect of anything upon their deliberations, the court's (continued)

But for the constitutional error in refusing to disclose the written instructions to defense counsel, the issue of delivery of supplemental written instructions would never have arisen, much less the issue of a belated[17] and controversial "correction" of the record. To affirm the convictions despite the Sixth and Fourteenth Amendment violation, the Ohio Supreme Court was forced (l) to conclude that jurors' testimony is inadmissible; (2) having disregarded that evidence, to conclude that the trial court had the discretion to correct the record; and (3) the record having been corrected, to find that no prejudice was demonstrated by the defendants. That reasoning obviously does not and cannot satisfy the constitutional test of harmless error.

The second finding made by the court below in finding "no prejudice" from the refusal to disclose written instructions was that apart from omission of the supplemental instructions, the written charge did not prejudicially vary from the charge given orally in open court.[18] The written charge (t.d. 415) differed so completely from the oral charge (t.p. 11458-11539) in its organization and in its wording that a line-by-line comparison is utterly impossible. In briefs on appeal, however, the defendants identified the following variances between the oral and written instructions as particularly prejudicial:

1. Statements in the written charge (but not the oral charge) that a "good purpose" is not a defense to unauthorized acts (t.d. 415 at 12, 24), which when

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invocation of the Ohio equivalent of Rule 606 of the Federal Rules of Evidence to bar those affidavits was unprecedented. Regardless of the propriety of the construction of the Ohio evidence rule when applied to *offensive* use of juror testimony to impeach a verdict, it denies due process to prohibit a defendant from *defensive* use of such testimony to impeach a constable's affidavit submitted by the State for the purpose of changing the record to salvage a criminal conviction. *Cf. Chambers v. Mississippi*, 410 U.S. 284 (1973); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (right to a "meaningful opportunity" to present a defense "would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim . . .").

[17] The Ohio Supreme Court did not take into account that the prosecutor waited to seek a change of the record until a month after the jury foreman died and several months after the court reporter's records were destroyed.

[18] This finding was made in the Warner opinion, where the court said simply that "we have reviewed Warner's other claims regarding alleged variations and find them to be meritless." (Pet. App. A, p. 41.)

combined with the instruction that "purpose and intent mean the same thing" (t.d. 415 at 12), effectively eliminated any intent element from the unauthorized acts offense.

2. Written (but not oral) instructions on the elements of unauthorized acts allowing conviction for unauthorized issuance of a "warrant or other order" (t.d. 415 at 24, 27, 28), even though Mr. Warner was not charged with and had no opportunity to defend against such a charge.

3. A written formulation of the "recklessly" standard with respect to the unauthorized acts counts, not found in the oral charge, that failed to require the jury to find, as provided by law, that the defendant acted "with heedless indifference to the consequences" (t.d. 415 at 13, 28; compare t.p. 11,480).

4. Handwritten corrections by the trial judge to an erroneous instruction on the relevance of "motive" in two places where it appeared (t.d. 415 at 12, 24), but not in the two other erroneous formulations that were specifically applicable to the unauthorized acts offense (t.d. 415 at 24).

5. A written instruction on Count 85 that R.C. § 1707.29 "*requires the defendants to exercise reasonable diligence* to acquire knowledge they should have had in order to come to a good faith belief that the facts represented were true" (t.d. 415 at 207), thus not only creating a presumption of knowledge but placing an affirmative duty upon the defendants to exercise reasonable diligence, for violation of which they could be convicted of fraud.

The purpose of requiring that a written charge be disclosed to counsel was described by this Court in *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919); the rule is necessary to fulfill

> the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which

> it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated.

Because the trial judge in this case refused to allow the defense to see the written instructions either before oral argument, or before they were given to the jury, or even during deliberations, the defense had no opportunity to correct the foregoing errors in the written charge.

Numerous courts have held that when a written charge varies materially from the charge given orally, reversal of the conviction is required, for the obvious reason, among others, that "written instructions may be reinforced by their physical presence in the jury room, as the oral instructions fade from memory." *People v. Owens*, 69 N.Y.2d 585, 591, 509 N.E.2d 314 (1987); *accord*, *State v. McCloud*, 349 N.W.2d 590, 592 (Minn. 1984); *State v. Hamm*, 611 S.W.2d 826, 830 (Tenn. 1981); *Wallace v. State*, 426 N.E.2d 34, 36 (Ind. 1981); *Payne v. State*, 395 So. 2d 284 (Fla. App. 1981). In *People v. Owens*, *supra*, the New York Court of Appeals held that such an error could never be considered harmless. 69 N.Y.2d at 591. Whether or not that is true, the constitutional error in refusing to disclose written instructions to the defense, resulting in materially erroneous instructions being given to the jury, cannot in this case be found harmless beyond a reasonable doubt, as required by decisions of this Court that the Ohio Supreme Court ignored.

4. This Court Should Decide Whether A State May Reduce The Mens Rea Of An Offense After The Evidence At Trial Fails To Establish The Mens Rea Upon Which The Defendant Was Charged And Tried

Mr. Warner was charged with 41 counts of misapplication and 41 counts of unauthorized acts, all in violation of Section 1153.01 of the Ohio Revised Code. Each of these counts of the indictment charged that defendants acted "with intent to injure or defraud Home State."

Section 1153.01 of the Ohio Revised Code does not on its face include a requirement of intent to injure or defraud, as to either the willful misapplication or the unauthorized acts prohibitions set forth in that statute. Such an intent element, however, was set forth in the predecessor statute enacted in the 19th century, and it was interpolated

by the Ohio Supreme Court to remain an element of the offenses despite omission of the language during a 1910 Code revision. *See State v. Keith*, 91 Ohio St. 132, 110 N.E. 188 (1914); *Peskind v. State*, 115 Ohio St. 279, 152 N.E. 670 (1926). The same conclusion has been reached by the federal courts in interpreting the federal unauthorized acts offense, 18 U.S.C. §§ 657, 1005, upon which the Ohio statute was modeled, and which similarly omitted the intent to injure or defraud language in a 1948 code revision. *United States v. Pollack*, 503 F.2d 87 (9th Cir. 1974); *see United States v. Malone*, 837 F.2d 670 (5th Cir. 1988) (confession of error by United States).

In Mr. Warner's case,[19] the indictment charged that he acted with intent to injure or defraud. On the eve of trial, the prosecution submitted a memorandum urging the trial judge to instruct the jury that the requisite mental state was "knowingly." (T.d. 166 at 20.) It argued that "the mens rea is knowingly .... There has to be a knowing act on the part of the defendants." (T.p. 108.) The case was tried on this basis, and the State's evidence failed to show that Warner knew of the board of directors' resolution limiting collateralization on repurchase agreements, which was the foundation of the unauthorized acts counts. After all its evidence was in, however, the State changed its position and asked for an instruction that Warner should be convicted for acting "recklessly." The day before closing arguments, the trial judge granted the prosecution's request over vigorous objection. After sentencing, the judge publicly stated that he "broke new ground," and explained that an intent to injure or defraud "puts the onis [sic] more on the prosecution," whereas "as I interpret [the law] it's easier to convict." (T.d. 380, Exh. B, p. 12.)

The interpretation to be given a state statute is not, of course, a question that this Court may decide. Federal constitutional law does, however, forbid state courts from retroactively changing the elements of an offense to the detriment of a defendant. *See Marks v. United States*, 430 U.S. 188 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). The Sixth and Fourteenth Amendments also require fair notice to the defendant of the elements of the offense for which he is to be tried, and prohibit conviction "upon a charge not made or upon a

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[19] Petitioner Schiebel was acquitted on all counts charging unauthorized acts, and this issue accordingly is presented only as to petitioner Warner.

charge not tried." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979); *accord, De Jonge v. Oregon*, 299 U.S. 353, 362 (1937).

Whether a criminal conviction may be obtained upon proof of a lesser mens rea than charged in the indictment, or upon a lesser mens rea than the state contends to be an element of the offense up to the time its evidence at trial falls short, are questions never directly considered by this Court. The Sixth Circuit, in *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977), did face a similar issue and concluded it was a denial of due process to permit the defendant to be convicted of first degree premeditated murder where the prosecutor, up to the time the state's evidence was completed, contended that the indictment charged first degree felony murder. The court pointed out that the change prejudiced the defendant, who throughout the state's case followed a strategy and cross-examined witnesses with the purpose of defending against felony murder. The same is true in this case, where the strategy and cross-examination by Mr. Warner's counsel throughout the State's case was geared to proving he did not know of the Board resolution upon which the unauthorized acts counts were based. For the prosecution and the trial judge to switch, at this stage of the trial, to a charge that Warner acted "recklessly" with respect to whether the margin payments were authorized or not, resulted in conviction upon a charge not made and not tried.

Whether due process permits a prosecutor and trial judge to manipulate a charge to the detriment of a defendant, as sanctioned by the Ohio courts in this case but condemned by the Sixth Circuit in *Watson v. Jago, supra*, should be determined by this Court.

5. A Rule Permitting Exclusive Reliance On Voir Dire Under All Circumstances To Safeguard The Right To An Impartial Jury Is Inconsistent With Prior Decisions Of This Court

This Court has recognized that circumstances may create such a "wave of public passion" in the community that jurors' claims of impartiality on voir dire should not be credited. *See Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *see also McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987)("[w]idespread bias in the community can make a change of venue constitutionally required"); *Patton v. Yount*, 467 U.S. 1025, 1031 (1984). Many of the lower courts, however, have interpreted this

Court's holdings that the primary test for partiality is the voir dire examination to be a *per se* rule that voir dire may be relied upon no matter how extreme the circumstances of the case and no matter how likely it is that jurors' claims of impartiality are suspect. *See United States v. Parker*, 877 F.2d 327, 331 (5th Cir.) (even if community saturated with inflammatory publicity raising a presumption of prejudice, voir dire may rebut presumption), *cert. denied*, 110 S. Ct. 199 (1989); *United States v. Harrelson*, 754 F.2d 1153, 1159 (5th Cir. 1985); *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir.), *cert. denied*, 459 U.S. 846 (1982); *Coleman v. Kemp*, 778 F.2d 1487, 1541 n.25 (11th Cir. 1985) (voir dire may rebut presumption of prejudice), *cert. denied*, 476 U.S. 1164 (1986); *see also United States v. Glaze*, 866 F.2d 253 (8th Cir. 1989); *but see United States v. Angiulo*, 897 F.2d 1169, 1181-82 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990). This Court should grant review to clarify the scope of its rulings on the role of voir dire in ensuring an impartial jury.

The collapse of Home State and the consequent savings and loan crisis in Ohio generated enormous publicity, public outrage and intense hostility towards the defendants in Hamilton County where the case was tried. (*See* t.d. 53, Exhs. C-I; t.d. 163, 224). The trial judge himself observed, in a televised interview shortly after the verdict, that the case was "an open sore on the community." (T.d. 380, Exh. A, p. 3).

Home State and most of its depositors were located in Hamilton County, and Hamilton County also had the highest concentration of other savings and loans temporarily closed as a result of the Home State collapse. (T.d. 53, p. 20). Depositors at Home State and other ODGF-insured institutions had their funds frozen for periods ranging from a few days to more than a year: checks bounced, bills could not be paid, and depositors lived in fear that their funds might be lost forever. Not only the potential jurors themselves, but numerous friends, relatives, neighbors and co-workers of those prospective jurors had a direct experience of the events at issue in the trial.[20] Where

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[20] If there were any doubt that the prosecution was seeking *in this case* to hold the defendants responsible not only for the collapse of Home State but for the entire savings and loan crisis in Ohio, that doubt was removed in closing argument when the prosecutor appealed to the jury to fix "responsibility" for the "disaster" (t.p. 11041-42) (emphasis added):

(continued)

these events affected people's daily lives in such practical and financial terms, the effect of the enormous pretrial publicity was especially salient. The potential for juror infection by prejudicial publicity and personal experience presented an unacceptable danger that voir dire would not ferret out partiality because such bias would in some cases manifest itself in deception and dissembling. *Cf. Rideau v. Louisiana*, 373 U.S. 723 (1963); *Marshall v. United States*, 360 U.S. 310, 312-13 (1959). Indeed, a federal court granted a change of venue to Michigan for Mr. Warner's trial on similar federal charges, where he was acquitted on all counts by a jury drawn from a community not poisoned by the effect of the Home State collapse and the publicity that followed it.

Although the trial judge disqualified Home State depositors and their families from serving as jurors in this case on the ground that they were in essence victims of the offense charged, he refused to disqualify depositors at any closed institution other than Home State. The court denied challenges to six depositors at closed institutions, one of whom (Ms. Statt) served on the jury after the defendants had exhausted their peremptory challenges. The Ohio Supreme Court's conclusion that Ms. Statt's testimony on voir dire established that she suffered no "injury" but only financial "inconvenience" in the form of the temporary loss of her bank account and the bouncing of her checks does not even address the more fundamental error of exclusive reliance on voir dire to protect a defendant's right to an impartial jury in the circumstances of this case.

The error in relying on voir dire to determine juror impartiality is confirmed in this case by the post-trial disclosures as to juror Larry Dalton, who revealed no opinions during voir dire yet later admitted stating to another juror that he hated Marvin Warner. Dalton also denied on voir dire that he was related by marriage to any Home State

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> What you have heard and witnessed is the saga perhaps of the greatest financial disaster in the history of this state.
>
> By this time everybody is fully aware of the fact that Home State Savings Bank collapsed, *the system in Ohio virtually collapsed, and what this trial is designed to do is to seek the truth, to find out in large part who is responsible for the collapse* and whether these three defendants have criminal responsibility for their actions in the conduct of the affairs of Home State's business.

depositor, yet told jurors during deliberations that his mother-in-law had an account at Home State. Although this information would have disqualified Dalton from serving as a juror, and although it was reported to the court constable on the day of the verdict, the constable – while acknowledging that this information could cause a mistrial – did not disclose it to counsel or advise the juror to report it. Ordinarily, due process requires a post-trial hearing at which juror testimony will be admitted when counsel learns after the verdict of a juror's possible bias that was unknown during voir dire. *See Rushen v. Spain*, 464 U.S. 114, 119 (1983). At a minimum, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The trial judge instead concluded that "[t]he fact that a juror 'hated' one of the defendants, even if true, is not grounds for a new trial." (Pet. App. I, p. 3.)

This Court should grant review and provide guidance to the lower courts that exclusive reliance on voir dire is not in all circumstances sufficient to guarantee an impartial jury, and particularly in a circumstance where the community is saturated with persons who are directly and financially affected by the alleged offense.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROGER J. MAKLEY
JANICE PAULUS
COOLIDGE, WALL,
WOMSLEY & LOMBARD
600 IBM Building
33 W. First Street
Dayton, Ohio 45402
(513) 223-8177

Attorneys for Petitioner
David J. Schiebel

HERBERT J. MILLER, JR.
WILLIAM H. JEFFRESS, JR.
(Counsel of Record)
JULIA E. GUTTMAN
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner
Marvin L. Warner

LAWRENCE HERMAN
1659 N. High Street
Columbus, Ohio 43210
(614) 292-6691

BOBBY LEE COOK
COOK & PALMOUR
128 South Commerce Street
Summerville, Georgia 30747
(404) 857-3421

Of Counsel

LOUIS A. JACOBS
4905 Green Acres Drive
Columbus, Ohio 43220
(614) 459-5690

Of Counsel

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APPENDIX

APPENDIX A

55 Ohio St. 3d 31, 564 N.E. 2d 18

The State of Ohio, Appellant and Cross-Appellee, v. Warner, Appellee and Cross-Appellant.

The Supreme Court of the State of Ohio
Nos. 89-584 and 90-84

October 26, 1990

1. The commissioning of a special prosecutor is a constitutional exercise of legislative power when the General Assembly has conferred the powers of appointment, removal and supervision on the state Attorney General

2. R.C. 1707.44(B)(4) and (J) prohibit only affirmative misrepresentation; they do not apply to fraudulent nondisclosure.

3. R.C. 1707.44(G) prohibits not only affirmative misrepresentation, but also fraudulent nondisclosure where there is a duty to disclose. However, a defendant is not entitled to a jury instruction on nondisclosure and duty to disclose unless the state's case is premised on nondisclosure.

4. Under R.C. 1707.44(B)(4), (G), and (J), a person is criminally liable if he represents facts to be different than he should have known them to be if he had exercised reasonable diligence to ascertain the facts prior to the commission of the offense. (*State v. Walsh* [1979], 66 Ohio App. 2d 85, 95-96, 20 O.O 3d 178, 184-185, 420 N.E. 2d 1013, 1020, applied and followed; R.C. 1707.29, construed.)

5. The transfer of funds through the Fedwire system qualifies as a "draft" or other "written instrument" as those terms are used in R.C. 1153.01.

6. A court may order a defendant to pay restitution for financial damages pursuant to R.C. 2929.11.

7. The commission of unauthorized acts in violation of R.C. 1153.01 is a theft offense within the meaning of R.C. 2913.01(K)(3).

8. Any violation of R.C. 1707.44(B)(4), 1707.44(G) or 1707.44(J) is a theft offense within the meaning of R.C. 2913.01(K)(3).

(Nos. 89-584 and 90-84 - Submitted June 6, 1990 - Decided October 26, 1990.)

APPEALS and CROSS-APPEAL from the Court of Appeals for Hamilton County, Nos. C-870222 and C-880072.

On December 13, 1985, defendant-appellant, Marvin L. Warner, and two former Home State Savings Bank ("Home State") presidents, David J. Schiebel and Burton M. Bongard, were indicted and charged with numerous felonies arising from Home State's dealings with ESM Government Securities, Inc. ("ESM"). The amended indictment charged Warner with forty-two counts of misapplication of funds and forty-one counts of unauthorized acts in violation of R.C. 1153.01. Further, Warner was indicted on four counts of securities fraud in violation of R.C. 1707.44(B)(4), 1707.44(G), 1707.44(D), 1707.44(F) and former 1708.05 (as now codified in R.C. 1707.44[J]). Of the eighty-eight counts in the amended indictment, counts eighty-four and eighty-eight were dismissed by the trial court. On March 2, 1987, Warner was convicted on six counts of unauthorized acts and three counts of securities fraud, which included violations of R.C. 1707.44 (B)(4), 1707.44(G) and 1707.44(J). On March 30, 1987, Warner was sentenced to ten and one-half years of incarceration, seven of which were suspended, and ordered to pay restitution in the amount of $22,000,000 and costs of $250,000.[1] The pertinent facts to this appeal are set forth below.

[1] The court of appeals vacated the $250,000 costs of prosecution assessed against Warner. The court found that the award was based on a "statement of costs" submitted by the prosecution which was not certified by the clerk of the court of common pleas pursuant to R.C. 2949.14. Since the state has not appealed this judgment ordering a remand on the issue of costs, we will not address the merits of whether R.C. 2949.14 requires certification of the bill of costs before the trial court's order is valid.

Home State was a state-chartered, privately insured savings and loan association headquartered in Cincinnati, Ohio. Home State was regulated by the Ohio Division of Savings and Loan Associations ("ODSLA") and the Ohio Deposit Guarantee Fund ("ODGF"), a private insurance fund to which Home State belonged. The ODSLA and the ODGF cooperated in regulating member institutions such as Home State.

The controlling shareholder of Home State was Warner. Warner also was responsible for selecting both Bongard and Schiebel to serve as Home State's presidents. Moreover, it seems Warner selected Home State's board of directors.

Home State's collapse began in the spring of 1977, when Warner met Ronnie Ewton, the chairman of the board of ESM. ESM, of Fort Lauderdale, Florida, was principally involved in trading governmental securities and entering into repurchase transactions ("repos") using government securities as collateral.[2] In 1977, Home State had ESM

Nevertheless, because we reinstate Warner's conviction, we note that on remand from the court of appeals to the trial court the prosecution may resubmit its statement of costs.

[2] A repurchase agreement is similar to a collateralized loan, with the security subject to repurchase pledged as collateral. The repurchase agreements between Home State and ESM were of two types. In the first type of transaction, Home State "sold" securities in its investment portfolio to ESM, subject to Home State's obligation to repurchase and ESM's obligation to convey the securities at a later date for a specified price. The funds paid by ESM to Home State for the securities in effect constituted a loan to Home State from ESM, with the securities pledged by Home State serving as collateral. Home State periodically paid interest on the borrowed funds and received the coupon interest paid on the securities. In the second type of transaction, Home State purchased securities at a discounted price, and ESM simultaneously extended to Home State a loan, collateralized by the securities purchased. Again, Home State agreed to repurchase and ESM agreed to reconvey the securities at a later date, and Home State's interest payment came due on that date. In both types of transaction, the security subject to repurchase passed into ESM's possession for the term of the repurchase agreement and could be sold by ESM to third parties under an additional repurchase agreement.

Whether a transaction is characterized as a repurchase agreement or a reverse repurchase agreement depends on whether the transaction is viewed from the perspective of the party supplying funds or the party acquiring funds. Viewed from Home State's perspective, the transactions were reverse repurchase agreements because Home State was "selling" securities and "borrowing" funds rather than "buying" securities and "lending" funds.

serve as its primary broker in its purchases and sales of government securities and in its investments in reverse repurchase agreements.

Beginning in 1980 and continuing through February 1985, Home State entered into a series of extremely large repurchase transactions (*i.e.*, "leveraged arbitrages") with ESM. In these transactions, Home State, rather than pledging its own portfolio securities to support a "loan," relied on ESM to finance and purchase for Home State government securities worth hundreds of millions of dollars. The government securities Home State purchased with funds borrowed from ESM were placed under ESM's exclusive custody as collateral for the duration of the leveraged arbitrage, which was typically one year.

The amount of collateral Home State pledged to ESM was exceedingly large in relation to the amount Home State borrowed from ESM. The collateralization rate, *i.e.*, the ratio of market value of collateral pledged to the amount borrowed, for repurchase transactions should normally have been, according to industry standards, no more than one hundred five percent for treasury obligations and no more than one hundred ten percent for agency obligations. However, between 1980 and 1983, the collateralization rates for Home State's transactions were as high as two hundred thirty-eight percent. Further, between February 1980 and 1985, Home State's repo loan balance with ESM ranged from $80,000,000 to $800,000,000. Each of these transactions increased the risk of loss to Home State. The difference between the market value of the collateral Home State pledged to ESM and the amount Home State borrowed from ESM was the amount Home State would lose should ESM be unable to redeliver the securities at the end of the transaction. The amount placed at risk by the overcollateralization was the functional and financial equivalent of interest free, unsecured loans from Home State to ESM.

In addition to the leveraged arbitrage transactions, Home State was able to offset losses from its normal operations with gains derived from "day trades"[3] with ESM.

By 1982, the extent and nature of Home State's involvement with ESM prompted concern and criticism by ODGF and ODSLA. A

[3] A "day trade" is the sale of a security made prior to the date that the purchase price of the security is required to be paid or settled.

1982 report of an examination of Home State conducted by ODSLA criticized Home State's excessive overcollateralization of its repurchase agreements with ESM and questioned the association's unusual success in day-trading activity. In ODSLA's report, the examiner characterized Home State's excessive overcollateralization of its repurchase agreements as "an unsafe and unsound practice" which "pose[d] a serious risk to * * * [Home State]." The examiner noted that national examining guidelines consider as unacceptable overcollateralization in excess of one hundred five percent on repurchase transactions involving government obligations or in excess of one hundred ten percent on repurchase transactions involving Government National Mortgage Association securities ("GNMAs" or Ginnie Maes"). Nevertheless, the average collateralization rate of Home State's repo portfolio with ESM was 211.2 percent. The market value of all Home State securities assigned to ESM as of late June 1982 was more than twice the amount of the funds that Home State had borrowed on those securities. The ODSLA report warned:

"Consequently, * * * [Home State] is vulnerable to a potential loss of about $125 million on these securities under repo agreements, should ESM be unable for any reason to redeliver the securities upon expiration of the repo agreements. * * * [Home State's] net worth is about $12 million and ESM's net worth is less than $15 million * * *.

"Such excessive overcollateralization, as herein delineated, poses a serious risk to * * * [Home State], and must be considered an unsafe and unsound practice. * * *

"* * *

"* * * [Home State's] depositors, as a result of these repo transactions alone, would be confronted with possible losses of more than ten times the parent company's $12 million loss. Such losses would exceed 25 percent of the depositors' saving capital and almost twice the assets of the Ohio Deposit Guarantee Fund."

The report concluded that the income generated by these repo transactions did not justify the tremendous risk to Home State, its depositors and the ODGF.

The ODGF agreed with ODSLA's conclusions regarding the tremendous risk created by the ESM transactions and, beginning in

1982, issued a series of directives instructing Home State to reduce its involvement with ESM. As illustrated in a letter to Schiebel dated June 2, 1982, the ODGF wrote:

"There is no question, in our minds, that the risk involved in * * * [these transactions] far exceeds any income that can be derived from it. The potential risk exposure not only puts Home State at risk, but the Fund as well. To burden the Fund and its membership with such a risk is, in our opinion, imprudent and unfair."

Finally, in response to the 1982 state examination report, which had noted the increase in Home State's involvement with ESM, the ODGF sent another letter to Home State dated February 25, 1983 which read in pertinent part:

"* * * We are *most concerned* with the *extreme amount* of over-collateralization of the reverse repo (borrowed money) with ESM Government Securities. As of June 30, 1982, the Association has borrowed money from ESM of $83.8 million and collateral assigned aggregating a market value of $177.1 million, which is $93.3 million in excess or a voluminous *211.2%* of the amount borrowed. As of January 31, 1983, the amount of borrowed money is still $80.5 million and the over-collateralization continues at approximately the same level. In addition, national examining guidelines consider as unacceptable all cases of over-collateralization in excess of *105%* of the market values for U.S. government obligations and *110%* for Ginnie Mae securities.

"This *substantial* over-collateralization of the borrowed money to ESM is an unsafe and unsound practice, and is completely unacceptable to the Ohio Deposit Guarantee Fund as it should be to you. This potential risk to Home State and the Fund cannot be permitted to continue.

"We direct you to reduce the market value of Home State's collateral to an amount ranging from 105 to 110% of the amount borrowed from ESM. This reduction must occur as soon as possible, but in no event later than the present term of the reverse repos which, we understand, is no later than June 30, 1983. * * *

"Please forward to us, within thirty (30) days, a copy of your Board Resolution showing compliance with the above directives. The

Resolution must be signed by each Director and made a part of the Minutes. * * *" (Emphasis *sic.*)

At an April 28, 1983 meeting, the Home State board of directors passed a resolution expressly limiting the collateralization rates to prevent the risk of loss on Home State's repurchase transactions. The resolution stated: "RESOLVED that the Company [Home State] comply with the February 25, 1983 letter from the Ohio Deposit Guarantee Fund. This letter was transmitted by Charles Mayleben, Vice President in Charge of Supervision." Both Schiebel and Bongard were among the five board members who signed the resolution. Two of the outside directors, Robert E. Braun and Arthur C. Elliott, testified that this resolution was never modified or rescinded, and that the board never gave anyone authority to act contrary to its terms. Thus, the board expected full compliance with its resolution.

Before the ODGF's demand for the board resolution was acted upon, Warner and Home State personnel reviewed a $700,000,000 proposal from ESM at an April 13, 1983 meeting. The proposal consisted of a year-long leveraged arbitrage in which Home State would purchase approximately $700,000,000 of thirty-year GNMAs, and simultaneously pledge those securities to ESM in exchange for financing the purchase. This proposal also called for Home State to take a short position in its futures market to hedge against potential market effects.[4]

Home State approved a repurchase proposal pursuant to which it ultimately purchased $300,000,000 in GNMAs and $400,000,000 in five-year United States treasury notes and pledged the securities to ESM under a one-year repurchase agreement. The proposal included a matching GNMA futures transaction as a hedge against the risk that, at the end of the repurchase term, an increase in market interest rates would reduce the value of the securities below cost. Because the value

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[4] As the state notes in its brief, the hedge was designed to protect Home State only against fluctuations in the market price of the $300,000,000 in GNMA's and the $400,000,000 in treasury notes Home State was purchasing from ESM through leveraged arbitrage. The hedge did not protect Home State against the huge risk of loss created by its overcollateralization with ESM. Thus, regardless of the amount of funds Home State received or was required to pay with respect to the futures market, Home State's enormous risk of loss with ESM stayed constant.

of the government securities was subject to change with changing market interest rates, either party was entitled to make "margin calls" on the other party every thirty days to maintain the desired percentage of collateralization. Warner invested $100,000,000 in an identical repurchase agreement. Although the transaction represented over one hundred percent of Home State's assets, it was never brought to the attention of Home State's board of directors for approval. Instead, both the regulators and the board were led to believe that Home State would substantially reduce its involvement with ESM in the spring of 1983 as per the board's resolution.

Beginning on May 31, 1983, ESM made its first margin call on Home State. Margin calls continued through October 14, 1983, and Home State responded with forty-one payments to ESM which totalled in excess of $114,000,000. Although the repurchase agreement permitted margin calls in either direction in relation to fluctuations in the market interest rates, Home State made no margin calls on ESM during this period, although market conditions at times would have justified them. Frequently, Home State personnel claimed that they could not even find sufficient funds to meet the multi-million dollar payments to ESM required by the margin calls. Therefore, on some occasions, Home State pledged additional securities to ESM to raise funds to make the payments. Each of these payments violated the April 1983 resolution of the board and created a greater risk of loss to Home State.

In June 1983, the ODSLA examiner who had previously prepared the 1982 examination report returned to Home State to review the status of the association's repurchase agreements. The examiner noted in his status report that collateralization of the repurchase agreements had been substantially reduced, from $125,000,000 to $55,000,000, although he found that Home State's exposure to loss was still substantial because collateralization still exceeded the association's net worth. He later testified that the risk of loss was not reduced by the hedge, which merely protected against interest rate fluctuations. The ODGF reviewed the ODSLA status report. In correspondence to Home State on August 9, 1983, the ODGF noted that the report disclosed collateralization of the April 13, 1983 repurchase agreement in excess of ODGF directives and questioned whether

Home State's directors, when presented with the transaction, had been made aware that the continuing transaction violated the April 1983 board resolution.

By August 1983, apparently Warner had become concerned over the April 1983 repurchase agreements. To get a detailed update on the market losses in his personal account and Home State's position with ESM, Warner called a meeting attended by Home State officers. At the meeting, they discussed the extent of Home State's excessive collateralization and the fact that Home State was beyond the one hundred five and one hundred ten percent limits. Gerald Stephens presented worksheets to Warner which evidenced that Home State's repurchase agreements were over-collateralized by $32,500,000 over the guidelines and that Home State had at risk $73,000,000 as a result of the margin payments.

Warner then called a second meeting with officers of Home State on August 29, 1983. At this meeting, Warner instructed Home State that his approval was necessary for future payments to ESM. Following this meeting, Home State sent Warner written "margin memos," which documented Warner's approval for sending additional Home State funds to ESM. Subsequently, six more transfers totalling $12,200,000 were sent to ESM; these transfers represented the six unauthorized acts of which Warner was convicted at trial.

The following facts relate to the three counts of misrepresentation in regard to sales of securities of which Warner was convicted. Warner was also the majority shareholder of Home State Financial, Inc. ("HSFI"), the parent corporation of Home State, and Bongard and Schiebel served as officers and directors of the corporation. In 1979, HSFI had issued five-year debentures in the amount of $29,000,000 which were due October 31, 1984. However, HSFI lacked the liquidity to redeem the debt, and ODGF regulations prevented Home State from using its assets to satisfy the debt of HFSI, its parent corporation.

On January 20, 1984, HSFI's counsel filed with the Securities and Exchange Commission ("SEC") a form S-2 registration statement which proposed the registration of $30,000,000 in new debentures to be offered in exchange for the corporation's outstanding debentures and, to the extent that the outstanding debentures were not exchanged, for cash at par value. Because the SEC was concerned with the risks

associated with Home State's repurchase agreements,[5] it did not approve HSFI's proposed offering. With only two months left to satisfy the SEC and to sell enough debentures to retire the $29,000,000 debt of HSFI, Warner along with Schiebel worked on a plan to merge HSFI with Home State, thereby making Home State's assets available to pay off the debenture debt. Schiebel approached the ODGF with the merger scheme in July 1984 without mentioning the pending S-2 or the SEC's questions concerning Home State's ESM transactions. In order to avoid missing the date for redeeming the debentures, HSFI decided to merge with Home State, Home State being the surviving entity. This enabled Home State, as a bank, to issue debentures *exempt* from SEC registration,[6] and use the proceeds to redeem HSFI's debentures.

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[5] On February 27, 1984, the SEC sent to HSFI its first comment letter on the S-2, focusing on the risks associated with Home State's day trades and HSFI's apparent inability to pay off the debentures because of the company's "continuous losses before equity in partially owned subsidiaries." HSFI responded to the SEC's comments by filing an amendment to the S-2 on April 13, 1984. Gary P. Kreider, a Cincinnati area attorney who was hired to assist HSFI in the SEC approval process, spoke with Warner on April 25, 1984, and explained the importance of Warner's review of the S-2. Warner agreed to review the materials and call Kreider if he had any changes.

On May 9, 1984, the SEC responded to HSFI's S-2 amendment with additional comments, focusing on Home State's anomalous transactions with ESM. HSFI filed a second amendment to the S-2 on May 25, 1984. The SEC, again not satisfied with HSFI's S-2 disclosures, issued a third comment letter on June 8, 1984. HSFI amended its S-2 a third time on July 13, 1984. The SEC issued its fourth comment letter on August 7, 1984 and inquired into the details of Home State's risk of loss in the ESM transactions. The SEC demanded a written response to its letter before any further S-2 amendments were filed. On August 24, 1984, the SEC sent a fifth comment letter which expressed extreme concern about the risk of loss to Home State if ESM went bankrupt.

[6] The merger required approval from both the ODSLA and ODGF. Warner met with ODGF officers Donald R. Hunsche and Charles Mayleben, to discuss the merger. Mayleben, who was responsible for analyzing the financial impact of the merger on Home State and the ODGF, noted that the merger would substantially reduce the net worth of the bank. Accordingly, ODGF decided not to approve the merger without a sufficient infusion of capital from Warner to make up for the resulting reduction in Home State's net worth. Warner therefore contributed real estate which, according to his appraisal, had a net value of approximately $18,000,000. By virtue of the merger, Warner traded an $18,000,000 capital investment for the right to use Home State funds to pay off HSFI's $29,000,000 debenture debt.

Following the merger, Home State sold new debentures by use of a four-page offering circular which incorporated by reference HSFI's 10-K and 10-Q filings. (As an issuer of publicly held securities, HSFI had been required to file with the SEC annual 10-K and quarterly 10-Q reports disclosing the financial condition and business relationship of HSFI and its subsidiaries, including Home State.) The offering circular, dated September 25, 1984, contained a general description of the debentures along with a two-page unaudited financial statement supposedly representing the true financial condition of Home State on a pro forma basis as of June 30, 1984. No reference to "ESM" appeared anywhere on the offering circular.

Warner was involved in drafting the offering circular. He reviewed and revised the initial draft and continually made changes until the circular was mailed on or about Friday, September 28, 1984. Home State's auditors never issued an opinion on the financial statements in the offering circular.

Home State's assets were overvalued in the offering circular's financial statements. Specifically, the "Loans and Other Receivables, net" assets were valued at $674,863,421 in the offering circular, although their true value was at least $5,000,000 less than this amount.

In the offering circular, Home State reported, via Warner, that its net worth using generally accepted accounting principles ("GAAP") was $3,707,463, while its net worth using regulatory reporting ("RR") was $21,752,176. This difference was attributed to

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The ODGF agreed to the merger subject to certain conditions negotiated with Warner. Warner, however, refused to guarantee the net worth of the merged entity and refused to become a director of Home State.

To secure expedited approval for the merger, Warner called the superintendent of ODSLA, Charles Lawrence Huddleston, to insist that the merger be approved. On August 27, 1984, Huddleston agreed to approve the merger, based upon Warner's promise to provide ODSLA with all information it requested, including audited financial statements of the merged entity, opinions from counsel on the tax consequences and accounting treatment of the merger, and Warner's personal financial statement (since he had guaranteed the sale price of the real estate.). At no time during these merger discussions was ODSLA or ODGF told of the difficulty HSFI was having in obtaining SEC approval of the S-2 because of Home State's relationship with ESM. Both Mayleben and Huddleston testified that information regarding the SEC's continuing questions about the ESM transactions would have affected their consideration of the requested merger by Warner.

the listing of Warner's real estate contributions to Home State (see footnote 6) under the RR side of the balance sheet at their purported fair market value. At trial, the evidence indicated that the inclusion of the real estate at fair market value on the offering circular financial statement was improper under RR absent the approval of the ODSLA. No ODSLA approval was ever given to Home State.

As of June 30, 1984, the date of the balance sheet in the offering circular, Home State's securities pledged to ESM had a fair market value $26,744,818 less than the value stated in the balance sheet. Warner knew of this discrepancy because he had received copies of reports which contained this information. Further, Warner also knew from his review of the S-2 that the S-2 financial statements contained footnotes reflecting the market value of these securities.

The 10-K and 10-Q reports contained several misstatements regarding ESM and Home State's relationship. The reports stated that ESM and Home State had no continuing agreements in regard to brokerage functions; that margin calls were made in accordance with fluctuations in the market; that Home State's day-trading successes were due to Home State management's ability to assess the market; and that Home State dealt with ESM on an agency basis, thereby minimizing Home State's risk of loss if ESM went bankrupt. None of these representations was true. The S-2 and its first amendment reviewed by Warner contained the same misrepresentations regarding Home State's "arm's length" dealings with ESM.

On January 21, 1985, Ewton, ESM's chairman, revealed to Stephen Arky, who was both Warner's son-in-law and outside legal counsel for ESM, that ESM had sustained massive losses. Arky conveyed this information to Warner, who then contacted Ewton and requested that he be apprised of ESM's situation. Warner then closed his personal account with ESM on January 28, 1985, and transferred his funds to financial institutions unrelated to Home State. On February 4, 1985, at Warner's request, Schiebel circulated a memorandum to the executive staff of Home State, demanding that no more memoranda be sent directly to Warner.

On February 26, 1985, Schiebel advised Home State's board of directors of his failed attempts to obtain from ESM an audited financial statement for 1984 and proposed that he visit ESM to resolve the

matter. When Schiebel returned from his visit, he reported that ESM's audited financial statements had been falsified for years.

On March 4, 1985, ESM filed a petition in bankruptcy, and it was publicly disclosed that ESM had suffered $300,000,000 in losses, which it had been concealing in false financial statements. At this time, Home State had approximately $140,000,000 in government securities at risk under repurchase agreements with ESM, and the threatened losses from ESM's bankruptcy exceeded the assets of the ODGF. On March 8, 1985, after an informal meeting of the board of directors, Home State closed. A week later, the Governor of Ohio closed all ODGF-insured member institutions. Consequently, indictments against Warner, Schiebel and Bongard followed.

Before trial, Warner moved for a change of venue, based on the potential effects of pretrial publicity on the jury. The motion was overruled. Further, the trial court ruled that depositors whose funds had been frozen at ODGF-member institutions other than Home State would not be summarily disqualified from service as jurors. The trial court did agree to exclude from the jury any depositor or debenture holder of Home State, as they were victims of the alleged crimes.

Voir dire commenced on Monday, November 17, 1986. All together, seventy prospective jurors for the panel were interviewed by counsel for the parties. In accordance with the court's prior ruling, any prospective juror who himself had or whose relatives had deposits in Home State was excluded.

After a three and one-half month trial, the jury rendered a guilty verdict on the counts stated above on March 2, 1987. Warner was sentenced to one and one-half years on counts seventy-two, seventy-four, seventy-six, seventy-eight, eighty and eighty-two, consecutive to each other. On counts eighty-three, eighty-five, and eighty-six, Warner was sentenced to one and one-half years, concurrent to each other, consecutive to the previously imposed sentence. Additionally, the trial court ordered Warner to pay restitution in the amount of $22,000,000, and costs amounting to $250,000.

On March 16, 1987, Warner filed a motion for a new trial. In this motion, Warner reasserted his challenge on the issue of venue in Hamilton County, Ohio. Also, Warner claimed jurors had been given a written charge which defense counsel had not been permitted to

examine or copy, and that those instructions varied from the oral charge. Furthermore, Warner claimed the convictions regarding the unauthorized acts differed materially from the indictment, thereby denying due process of law under the Ohio and United States Constitutions. There was no allegation of newly discovered evidence or juror misconduct as a basis for this motion for new trial.

On April 20, 1987, Warner moved for leave to file a second motion for a new trial, outside the fourteen-day limit provided in Crim. R. 33(B), and filed a motion for new trial based on "newly discovered" evidence relating to the misconduct of a juror. The motions were predicated on Crim. R. 33(A)(1), (2) and (6). The trial court overruled Warner's motion for leave to file motion for a new trial and for new trial based on juror misconduct.

Warner filed two appeals in the court of appeals, Nos. C-870222 and C-880072. On November 15, 1989, the court of appeals reversed and remanded Warner's conviction and sentence in case No. C-870222. The court decided that the trial court had committed prejudicial error in the following actions: denying Warner's challenge for cause of juror Beth Statt, granting the state's motion to amend the indictment, denying Warner's motion for acquittal on the charges of unauthorized acts, granting the state's motion to correct the record, allowing the constable's *ex parte* delivery of written instructions to the jury, failing to properly instruct the jury on a duty to disclose regarding the securities counts, ordering restitution without a sufficient evidentiary fundament, and imposing a judgment of costs which was not supported by a properly certified bill of costs pursuant to R.C. 2949.14. Thus, the court of appeals reversed and remanded the six counts of unauthorized acts to the trial court with instructions that Warner be discharged with respect to these counts. Also, the court reversed the judgments on the three securities counts and remanded them to the trial court for further proceedings. Further, the court of appeals in case No. C-880072 reversed the trial court's denial of Warner's motion for leave to file a motion for a new trial. The state filed a timely appeal from both judgments of the court of appeals and Warner has filed a notice of cross-appeal on issues decided adversely in case No. C-870222.

These causes are before the court upon the allowance of motions and cross-motions for leave to appeal.

Lawrence A. Kane, Jr., special prosecutor, *Mark A. Vander Laan, Carl J. Stich, Jr., Kenneth S. Resnick, Paul R. Mattingly* and *M. Gabrielle Hils*, for appellant and cross-appellee.

Miller, Cassidy, Larroca & Lewin, William H. Jeffress, Jr., R. Stan Mortenson and *Julia E. Guttman; Lawrence Herman, Louis A. Jacobs* and *Robert R. Hastings, Jr.*, for appellee and cross-appellant.

HOLMES, J. Because Warner and Schiebel were tried together, numerous issues presented on appeal by the state and on cross-appeal by the defendants are intertwined. To avoid duplication, we have resolved issues common to both defendants in either the instant case or *State v. Schiebel* (1990), 55 Ohio St. 3d 71, ___ N.E. 2d ___.

89-584

In case No. 89-584, the issues are whether there was clear and convincing evidence that Warner was unavoidably prevented from timely filing his motion for a new trial, and whether the *aliunde* rule incorporated into Evid. R. 606(B) was violated. For the reasons expressed in *State v. Schiebel, supra*, we hold that the court of appeals erred in substituting its judgment for that of the trial court. Thus, the judgment of the court of appeals is reversed.

90-84

I

Special Prosecutor

On cross-appeal, Warner's first proposition of law maintains that the appointment of the special prosecutor violated the principle of separation of powers embodied in the Ohio Constitution. Defendant claims that the legislation creating the special prosecutor in this case compelled the special prosecutor to act in a particular manner and, therefore, the General Assembly, not the Governor, directed the substance of the special prosecutor's duties. Further, defendant claims that the legislation unconstitutionally divested the executive department of its absolute discretion to decide whether to investigate and prosecute a particular matter.

As a preliminary issue we note, as did the court of appeals, that both defendants waived the issue of the constitutionality of the office of special prosecutor as established by Am. S.B. No. 147 by not challenging the legislation at trial. However, due to the importance of the legislation and its effects on the parties, we will examine the merits of this issue.

In response to the collapse of Home State and other Ohio savings and loan institutions, the General Assembly promulgated Am. S.B. No. 147[7] ("the Act"), which "[r]equire[d] that the special prosecutor

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[7] Initially, the General Assembly promulgated Am. Sub. S.B. No. 119 to deal with the crisis surrounding the Home State failure. 141 Ohio Laws, Part I, 300. Later, the legislation was amended in Am. Sub. S.B. No. 134, 141 Ohio Laws, Part I, 350, and Am. S.B. No. 147, 141 Ohio Laws, Part I, 387. In regard to the special prosecutor's power, Section 5 of Am. Sub. S.B. No. 119, as amended in Am. Sub. S.B. No. 134 and Am. S.B. No. 147, now provides:

"A special prosecutor shall be appointed by the attorney general to investigate and prosecute any criminal violations that may have been committed in connection with any events and circumstances that caused any savings and loan association to be placed in the possession of a conservator as of March 15, 1985, and any criminal activity by any depositor, investor, director, officer, or employee of any savings and loan association, any unlawful activity in the operation of any savings and loan association, or any unlawful activity by any state officer or employee in connection with the regulation, examination, inspection, or operation of any savings and loan association or any deposit guaranty fund or any person with whom an association had any contractual relationship.

"The special prosecutor also shall investigate and prosecute any criminal violations by any public official or any other person that may have been committed in connection with any events and circumstances that caused any municipal corporation in this state to suffer substantial financial losses as a result of transactions with E.S.M. Government Securities, Inc., of Fort Lauderdale, Florida, for which a receiver was appointed on March 4, 1985. The special prosecutor also may investigate any other conduct by a public official or any other person in connection with such transactions involving a municipal corporation that likely would give rise to civil liability.* * *

"The special prosecutor appointed pursuant to this section has the authority of special counsel designated by the attorney general, as set forth in section 2939.10 of the Revised Code.

"In carrying out his duties under this section, the special prosecutor shall have the power to direct the clerk of any court of common pleas within the state to issue any subpoena or similar process that the special prosecutor considers necessary or appropriate to the conduct of his investigation. A clerk of court who is directed to issue any such subpoena or similar process by the special prosecutor promptly shall

appointed under S.B. 119 of the 116th General Assembly to investigate and prosecute any criminal violations relating to the closing of the Home State Savings Bank [and] also investigate and prosecute criminal violations by any public official or other person relating to financial losses incurred by any municipal corporation as a result of transactions with E.S.M. Government Securities, Inc." Committee Comment to Am. S.B. No. 147. The purpose behind the Act was to require the Ohio Attorney General to appoint a special prosecutor to investigate and prosecute criminal violations committed in connection with events leading to the naming of a conservator for Home State. *Id.* The special prosecutor was commissioned, through Am. S.B. No. 134, with the same powers county prosecuting attorneys have under R.C. 2939.10.[8] *Id.* at 1-2.

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issue the subpoena or similar process. Testimony and documents compelled by such subpoena or similar process shall be delivered in private, and only the witness subpoenaed, the witness' counsel, the special prosecutor, members of the special prosecutor's staff, and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present during the giving of any testimony or the production of any documents pursuant to the subpoena or similar process. Any testimony or documents obtained through use of a subpoena or similar process issued pursuant to this section shall be used by the special prosecutor or his staff only in the performance of the duties of the special prosecutor. The powers herein enumerated shall be in addition to any other powers the special prosecutor has under other provisions of the Revised Code and the Ohio Rules of Criminal Procedure, and shall terminate upon the special prosecutor's completion of his duties under this section. This section shall not preclude a person charged with any offense from exercising any existing right of access to any testimony or documents obtained pursuant to this section.

"Notwithstanding the restrictions on divulging information contained in Chapter 1155. of the Revised Code, the special prosecutor appointed under this section may utilize his powers and authority granted under this section to review and make copies of any information relevant to his investigation under this section that the superintendent of building and loan associations, or any of his deputies, assistants, clerks, or examiners have obtained in or as a result of an examination or by reason of their official positions, and the superintendent, and his deputies, assistants, clerks, or examiners shall provide the special prosecutor with any such information requested in accordance with this section." 141 Ohio Laws, Part I, 387-389.

[8] R.C. 2939.10 provides, in part:

"* * * In all matters or cases which the attorney general is required to investigate or prosecute by the governor or general assembly, or which a special prosecutor is required by section 177.03 of the Revised Code to investigate and prosecute, the

We begin this analysis with the presumption that the Act is constitutional, and it will not be declared unconstitutional unless it "appear[s] beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State, ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E. 2d 59, paragraph one of the syllabus; *State, ex rel. Jackman, v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 161, 38 O.O. 2d 404, 405, 224 N.E. 2d 906, 908-909 ("* * * when an enactment of the General Assembly is challenged, the challenger must overcome a strong presumption of constitutionality").[9] Although the federal constitution is a grant of power to the federal Congress, the state constitution is primarily a limitation on legislative power of the General Assembly; therefore, the General Assembly may pass any law unless it is specifically prohibited by the state or federal constitutions. *Jackman, supra*, at 161-162, 38 O.O. 2d at 405, 224 N.E. 2d at 909.

In discussing the doctrine of separation of powers, we stated in *South Euclid v. Jemison* (1986), 28 Ohio St. 3d 157, 158-159, 28 OBR 250, 251-252, 503 N.E. 2d 136, 138 that:

"* * * While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework

attorney general or the special prosecutor, respectively, shall have and exercise any or all rights, privileges, and powers of prosecuting attorneys, and any assistant or special counsel designated by the attorney general or special prosecutor for that purpose, has the same authority. Proceedings in relation to such matters or cases are under the exclusive supervision and control of the attorney general or the special prosecutor."

[9] See, further, *State, ex rel. [Poe], v. Jones* (1894), 51 Ohio St. 492, 503-504, 37 N.E. 945, 948, where this court analyzed the legislative power:

"In determining whether an act of the legislature is or is not in conflict with the constitution, it is a settled rule, that the presumption is in favor of the validity of the law. The legislative power of the state is vested in the general assembly, and whatever limitation is placed upon the exercise of that plenary grant of power must be found in a clear prohibition by the constitution. The legislative power will generally be deemed ample to authorize the enactment of a law, unless the legislative discretion has been qualified or restricted by the constitution in reference to the subject matter in question. If the constitutionality of the law is involved in doubt, that doubt must be resolved in favor of the legislative power. The power to legislate for all the requirements of civil government is the rule, while a restriction upon the exercise of that power in a particular case is the exception.* * *"

of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government. See *State v. Harmon* (1877), 31 Ohio St. 250. See, also, *State, ex rel. Bryant, v. Akron Metro. Park Dist.* (1929), 120 Ohio St. 464. While no exact rule can be set forth for determining what powers of government may or may not be assigned by law to each branch, *Harmon, supra*, at 258, '* * * [i]t is nevertheless true, in the American theory of government, that each of the three grand divisions of the government, must be protected from encroachments by the others, so far that its integrity and independence may be preserved. * * *' *Fairview v. Giffee* (1905), 73 Ohio St. 183, 187."

In the case at bar, the General Assembly retained no powers of appointment, removal, supervision or review over the special prosecutor once the Act was passed. Rather, as the Act provided, the Attorney General held the power of appointment, which impliedly included the power to remove the special prosecutor and supervise or review his actions. Warner and Schiebel have failed to identify any portion of the Act which diminished the Attorney General's authority to assist or control the investigation by the special prosecutor. Instead, Warner claims that a letter dated August 6, 1985 sent to special prosecutor Lawrence A. Kane, Jr., by the Attorney General removed any control the executive branch had over the special prosecutor.[10] The letter, specifically drafted to address Kane's compensation as special prosecutor pursuant to his appointment by the Attorney General, reserved the power to *terminate* the special prosecutor at any time, subject to the limitations of the March 21, 1985 appointment

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[10] The letter provided with respect to the powers vested in the special prosecutor:

"You may assign any other attorney in the firm of Dinsmore and Shohl, under your supervision and control, and of qualifications similar to yours, to perform work in this matter. Both you and any person you assign will render services pursuant to this agreement as independent contractors. You are not to be regarded for any purpose as in the employment of or as employees of the Office of Attorney General, though it is acknowledged that you have been granted specific power associated with your appointment as Special Prosecutor which clothes you with and entitles you to the authority of a prosecutor or other authority as provided by Ohio law. It is acknowledged that for purposes of this appointment, Chapter 102 of the Ohio Revised Code is not applicable. This Office shall have no right to exercise any control over your office in exercising your judgment when discharging your professional responsibilities pursuant to this agreement."

letter establishing his authority to complete an investigation. Although the Attorney General indicated that he would not exercise control over the office of the special prosecutor, there was no legislative mandate that he abstain. Clearly, the level of involvement by the Attorney General's office was left within the prerogative of the Attorney General and not the General Assembly. The General Assembly's involvement was limited strictly to a call for executive action. Thus, Warner's argument that the General Assembly somehow controlled the investigation by the special prosecutor is without merit. We hold that the commissioning of a special prosecutor is a constitutional exercise of legislative power when the General Assembly has conferred the powers of appointment, removal and supervision on the state Attorney General.

The second part of Warner's discussion on the violation of the separation of powers doctrine is based on the prosecutor's power to obtain subpoenas. We reject this argument. Issuing subpoenas is a ministerial, not a judicial function. The Act mandates that the clerk of any court of common pleas, not the court itself, issue subpoenas when requested.[11] Therefore, the special prosecutor's subpoena powers did not infringe on judicial authority. Moreover, prosecutors generally have powers similar to those conferred on the special prosecutor by the Act. For example, R.C. 2939.12 requires clerks of courts to issue subpoenas for witnesses pursuant to grand jury investigations "[w]hen required by the * * * prosecuting attorney * * *." See, also, Crim. R. 17(F) (prosecuting attorneys may request the clerk of court to issue subpoenas for attendance at a hearing or trial).[12]

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[11] Am. S.B. No. 147, 141 Ohio Laws, Part I, 387, 388, provides with respect to the subpoena power of the special prosecutor that: "In carrying out his duties under this section, the special prosecutor shall have the power to direct the clerk of any court of common pleas within the state to issue any subpoena or similar process that the special prosecutor considers necessary or appropriate to the conduct of his investigation. A clerk of court who is directed to issue any such subpoena or similar process by the special prosecutor promptly shall issue the subpoena or similar process.* * *"

[12] In *In re Groban* (1955), 164 Ohio St. 26, 57 O.O 70, 128 N.E. 2d 106, affirmed (1957), 352 U.S. 330, this court by implication upheld an Ohio law which permitted state fire marshals to subpoena witnesses to testify in privately conducted investigations. For other illustrations of the use of investigatory subpoenas, see, *e.g.*, R.C. 103.17 (Legislative Service Commission); R.C. 119.09 (agencies subject to the Administrative Procedure Act); R.C. 4117.02 (H)(3) (State Employment Relations Board); R.C. 4121.15 (Bureau of Workers' Compensation).

Warner contends that the Act divests the courts of their inherent power to prevent abuse of process. This court has stated in instances where parties were subjected to discovery abuses that the court may issue a protective order. *Jackman, supra*, at 167, 38 O.O. 2d at 409, 224 N.E. 2d at 912. Similarly, where a special prosecutor has abused the subpoena power, an injured party may seek a protective order from the court. See *id.*[13] Absent from the record in this case is any request for a protective order regarding alleged misuse of the subpoena power by the special prosecutor. Moreover, Warner has failed to show specific instances where the special prosecutor abused the subpoena power. We are left to speculate as to what prejudice, if any, Warner may have suffered as a result of the special prosecutor's subpoena power. Warner has directed our attention to his motion to dismiss the indictment and suppress all evidence obtained directly or indirectly through the exercise of the subpoena power. Although some of the material which was the subject of the suppression motion was later introduced at trial, Warner has failed to specify how the subpoena power was misused. Therefore, Warner has not carried his burden of demonstrating reversible error.

For the reasons cited above, we overrule Warner's first proposition of law and find no error plain or otherwise.

II
Venue

Warner's second proposition of law asserts that the trial court erred in not granting his pretrial motion for a change in venue. Specifically, Warner claims the fact that Hamilton County was saturated with "victims" of the alleged offenses coupled with the intense media coverage prevented a fair and impartial jury from being selected.

Crim. R. 18(B) provides for a change of venue where, "[u]pon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise by held, when it appears that

[13] As the Act grants the special prosecutor no contempt or other enforcement powers, the special prosecutor must resort to the court for enforcement, thereby enabling challenges to his use of the subpoena.

a fair and impartial trial cannot be held in the court in which the action is pending." See, also, R.C. 2901.12(J). However, "[a] change of venue rests largely in the discretion of the trial court, and there are numerous cases holding that appellate courts should not disturb the trial court's ruling on a motion for change of venue in a criminal case unless it is clearly shown that the trial court has abused its discretion. * * *" *State v. Fairbanks* (1972), 32 Ohio St. 2d 34, 37, 61 O.O. 2d 241, 243, 289 N.E. 2d 352, 355, quoted in *State v. Maurer* (1984), 15 Ohio St. 3d 239, 250, 15 OBR 379, 388-389, 473 N.E. 2d 768, 780. Moreover, "[i]n the absence of a clear and manifest showing by the defendant that pretrial publicity was so pervasive and prejudicial that an attempt to seat a jury would be a vain act, and in the interest of judicial economy, convenience and [reducing] expense to the taxpayer, a good faith effort should be made to impanel a jury before the trial court grants a motion for change of venue." *State v. Herring* (1984), 21 Ohio App. 3d 18, 21 OBR 19, 486 N.E. 2d 119, syllabus. As an appellate court, we will look to the record where the issue of venue is concerned since "[t]he examination of jurors on their *voir dire* affords the best test as to whether prejudice exists in the community against the defendant, and where it appears that opinions as to the guilt of the defendant of those called for examination for jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, in absence of a clear showing of an abuse of discretion." *State v. Swiger* (1966), 5 Ohio St. 2d 151, 34 O.O. 2d 270, 214 N.E. 2d 417, paragraph one of the syllabus, certiorari denied (1966), 385 U.S. 874, quoted in *State v. Coleman* (1989), 45 Ohio St. 3d 298, 302-303, 544 N.E. 2d 622, 628; *State v. Thompson* (1987), 33 Ohio St. 3d 1, 5, 514 N.E. 2d 407, 412; *State v. Maurer, supra*, at 250-251, 15 OBR at 389, 473 N.E. 2d at 781; see, also, *State v. Bayless* (1976), 48 Ohio St. 2d 73, 98, 2 O.O. 3d 249, 262, 357 N.E. 2d 1035, 1051, vacated in part on other grounds (1978), 438 U.S. 911 (generally, "* * * a careful and searching *voir dire* provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality"); *In re Application of Natl. Broadcasting Co., Inc.* (C.A.D.C. 1981), 653 F. 2d 609, 617 ("*voir dire* has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner * * *"); *United States v. Duncan* (C.A.4, 1979), 598 F. 2d 839,

865, certiorari denied (1979), 444 U.S. 871; *Calley v. Callaway* (C.A.5, 1975), 519 F. 2d 184, 209, fn. 45.

Although a criminal defendant is entitled to a fair trial by a panel of impartial jurors, there is no requirement that "'* * * the jurors be totally ignorant of the facts and issues involved'" in the case. *State v. Thompson, supra*, at 5, 514 N.E. 2d at 412, quoting *Irvin v. Dowd* (1961), 366 U.S. 717, 722. Therefore, the trial court is required to examine "the totality of the surrounding facts" and arrive at its "own estimate of local conditions" when determining whether to change the venue in a particular case due to pretrial publicity. *Id.* at 721. It would be erroneous "[t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality * * *. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. * * *" *Id.* at 723. As stated in *Reynolds v. United States* (1878), 98 U.S. 145, 156, the proper test to determine a juror's bias is "whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact. * * *" Moreover, "[t]he affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * *." *Id.* at 157; see, also, *State v. Willey* (1981), 5 Ohio App. 3d 86, 89, 5 OBR 200, 202-203, 449 N.E. 2d 471, 474-475; *State v. Marra* (1985), 195 Conn. 421, 489 A. 2d 350 (when requesting relief, such as a change of venue or continuance, from allegedly prejudicial effects of publicity, defendant has the burden of showing that he could not receive a fair and impartial trial).

In order to dissipate the effects of adverse pretrial publicity, the judge may continue the case until the threat abates. See *State v. Fairbanks, supra*, at 37, 61 O.O. 2d at 244, 289 N.E. 2d at 352; *State v. Maurer, supra*, at 251, 15 OBR at 389, 473 N.E. 2d at 781, fn. 7. Here, the court did grant Warner's motion for a continuance, allowing over four extra months for pretrial publicity to dissipate. In fact, from the date of the indictment (December 13, 1985) to the day when voir dire began (November 17, 1986) over eleven months elapsed. "That time soothes and erases is a perfectly natural phenomenon, familiar to

all. * * *" *Patton v. Yount* (1984), 467 U.S. 1025, 1034; *Irvin v. Dowd* (C.A.7, 1959), 271 F. 2d 552, 561 (Duffy, J., dissenting), reversed (1961), 366 U.S. 717 (a continuance should have been granted because "[t]he passage of time is a great healer," and public prejudice might have "subsid[ed]"); *Beck v. Washington* (1962), 369 U.S. 541, 556.

In a thorough review of the record, we have observed that the trial court conducted an extensive voir dire of seventy potential jurors over a two-week period. The transcript contains approximately two thousand eight hundred pages of voir dire. The trial judge summarized the potential adverse effects caused by the pretrial publicity by stating in response to the defendants' motion for a change of venue that:

"In regard to the change of venue, we have engaged in extensive and comprehensive voir dire over the last two weeks or more, subjecting some 70 jurors to one and a half to two and a quarter hours of questioning, sometimes resembling a rigorous cross-examination rather than voir dire.

"But, as a result of this procedure, several facts have become apparent. That the passage of time has reduced the effect of pretrial publicity upon this case. That the majority of the jurors questioned answered the questions posed to them truthfully, and those that were outwardly and openly biased or prejudiced were dismissed.

"The court granted several challenges for cause against jurors who seemingly complied with the fair and impartial test set up by the criminal rules, but who demonstrated a possible prejudice.

"The jurors assembled for the general venire in this case represent what a venire in general represent[s], what the court has observed over the last eight years as a typical array of Hamilton County petit jurors.

"The jury commissioner and the court administrator's application of local rule 8(C) did not affect the jury array to the prejudice of either the defendants or the state, and that general hardship excuses are continuances, and are granted pursuant to that rule.

"All hardship excuses granted for the specific hardships created by service in this case, almost exclusively, based on the extended time of service predicted were passed upon by the court and counsel.

"Therefore, it is the considered opinion of this court that, as a result of the exhaustive draw for a fair and impartial jury panel, [one] has been found within the venue of Hamilton County, and that the defendants' motion for change of venue is overruled, please."

The trial court's postponement of its ruling on the motion for a venue change until completion of the voir dire permitted an informed conclusion by the court as to whether pre-trial publicity would prevent a "fair and impartial trial." See Crim. R. 18(B); *State v. Duerr* (1982), 8 Ohio App. 3d 404, 408, 8 OBR 526, 530-531, 457 N.E. 2d 843, 849. The trial court's actions do not reflect an attitude which was unreasonable, arbitrary or unconscionable. Therefore, there was no abuse of discretion. Accordingly, Warner's second proposition of law is overruled.

III
Juror Disqualification

In the state's first proposition of law and Warner's third proposition of law on cross-appeal, the issue is whether every potential juror should have been disqualified who had an account in any savings and loan institution that was temporarily closed by the Governor following the collapse of Home State. On the authority of *State v. Schiebel, supra*, at Part I of case No. 90-85, we sustain the state's first proposition of law, while overruling Warner's third proposition of law.

IV
Failure to Disclose
A

The state's proposition of law number five and Warner's proposition of law number twelve concern the necessity for an instruction on duty to disclose. Specifically, Warner claims that because the state's case was premised in part on fraudulent non-disclosure, he was entitled to a jury instruction that nondisclosure cannot be fraudulent absent a duty to disclose. As there is no dispute that an oral instruction on duty to disclose was given, Warner's proposition of law is premised only on the lack of written instructions. However, in *State v. Schiebel, supra,* at Part IIA, we reversed the court of appeals and accepted the

trial court's statement, correcting the record, that written instructions on the four disputed issues, including the instruction on duty to disclose, were delivered to the jury. The premise for Warner's proposition of law twelve therefore fails, and it is overruled for that reason.

Even if the disputed written instructions had not been delivered, Warner's proposition of law twelve would be overruled for the reasons that follow.

Both Warner and Schiebel were indicted and convicted on three separate counts of securities fraud under R.C. 1707.44. Count eighty-three charged Warner and Schiebel with violating R.C. 1707.44(B)(4), which provides:

"No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes:

"* * *

"(4) Selling any securities in this state[.]"

In count eighty-five, both defendants were charged with violating R.C. 1707.44(J), which states:

"No person, with purpose to deceive, shall make, issue, publish, or cause to be made, issued, or published any statement or advertisement as to the value of securities, or as to alleged facts affecting the value of securities, or as to the financial condition of any issuer of securities, when such person knows that such statement or advertisement is false in any material respect."

The amended indictment alleged with respect to counts eighty-three and eight-five that Warner, as an agent and sole shareholder of Home State, and Schiebel, as an officer and director of the bank, knowingly made or caused to be made, false representations concerning material and relevant facts in the offering circular issued by Home State for the purpose of selling securities in the state of Ohio.[14] It further alleged that with purpose to deceive, they made, issued,

[14] As will be discussed, *infra*, with respect to count eighty-three, the state alleged *affirmative* misrepresentations rather than omissions. Specifically, in relation to count eight-three, the state alleged in the indictment that there were false representations of material and relevant facts contained in the offering circular which included:

published or caused to be made, issued, or published false statements as to the financial condition of Home State as an issuer of securities.[15] These acts were alleged to have been committed when both defendants knew that such statements were false in a material respect.

"A. The Pro Forma Consolidated Balance Sheet at June 30, 1984 contained in the Offering Circular stated that in the opinion of management, the Bank and subsidiaries had a combined total stockholders equity of $21,752,176 according to regulatory reporting methods as prescribed by the State of Ohio, when in fact the Defendants knew that the Bank and subsidiaries had a combined total stockholders equity substantially less than said amount.

"B. The Pro Forma Consolidated Balance Sheet at June 30, 1984 contained in the Offering Circular stated that in the opinion of management, the Bank and subsidiaries had a combined total stockholders equity of $3,707,463 according to generally accepted accounting principles, when in fact the defendants knew that the bank and subsidiaries had a combined total stockholders equity substantially less than said amount according to generally accepted accounting principles.

"C. The disclosures of the Bank's relationship with ESM and its affiliates, as contained in reports filed with the United States Securities & Exchange Commission on Form 10-K for the year ended December 31, 1983 and on Form 10-Q for the six-month period ended June 30, 1984, which Forms were incorporated by reference in the Offering Circular, were false representations of material and relevant facts in that such Forms misrepresented the extraordinary level of involvement and dependency between the Bank and its affiliates and ESM, and further misrepresented the relationship of ESM and the Bank in various repurchase and reverse repurchase transactions, and further misrepresented the substantial contingent liability and attendant risk of loss to the Bank associated with its relationship with ESM and the aforementioned transactions.

"D. The disclosures of the Bank's transactions with ESM and its affiliates, as contained in reports filed with the United States Securities & Exchange Commission on Form 10-K for the year ended December 31, 1983 and on Form 10-Q for the six-month period ended June 30, 1984, which Forms were incorporated by reference in the Offering Circular, were false representations of material and relevant facts. Such representations were false in that the Forms failed to disclose that transactions identified therein as contributing to the profitability of the Bank were in fact transactions about which the Ohio Division of Savings & Loan Associations and the Fund had issued specific negative directives and comments and had registered serious and ongoing concerns related to the excessive and undue risk to the financial stability of the Bank created by such transactions. Such concerns and directives were material and relevant to an adequate understanding of the financial condition of the Bank."

[15] As noted with respect to count eighty-three, count eighty-five also alleged affirmative misrepresentations in regard to the offering circular developed and distributed by the defendants. In essence, the same conduct which violated R.C. 1707.44(B)(4) also violated R.C. 1707.44(J).

The court of appeals reversed the defendants' convictions as to counts eight-three and eighty-five, holding that written instructions concerning the duty to disclose were necessary and the trial court committed prejudicial error in failing to submit supplemental written instructions to the jury.

The state asserts that since Warner and Schiebel were charged with making only affirmative misrepresentations in violation of R.C. 1707.44(B)(4) and 1707.44(J), a duty to disclose was not an element of either offense, and that the defendants were, therefore, not entitled to have an instruction submitted to the jury on this issue.

The linchpin of Warner's argument with respect to counts eight-three and eight-five is that the state alleged in the indictment and bill of particulars that both defendants failed to adequately disclose relevant and material facts in the offering circular and, therefore, the state's case was premised on nondisclosure, which required a jury instruction.

Counts eight-three and eighty-five of the amended indictment charged, in pertinent part:

"The disclosures of the Bank's transactions with ESM and its affiliates, as contained in reports filed with the United States Securities & Exchange Commission on Form 10-K for the year ended December 31, 1983 and on Form 10-Q for the six-month period ended June 30, 1984, which Forms were incorporated by reference in the Offering Circular, were false representations of material and relevant facts. Such representations were false in that the Forms failed to disclose that transactions identified therein as contributing to the profitability of the Bank were in fact transactions about which the Ohio Division of Savings & Loan Associations and the Fund had issued specific negative directives and comments and had registered serious and ongoing concerns related to the excessive and undue risk to the financial stability of the Bank created by such transactions. * * *"

The bill of particulars[16] with respect to counts eight-three and eight-five states in part:

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[16] A review of the record does not disclose an amended bill of particulars; however, the original bill of particulars stated the alleged misconduct by both Warner and Schiebel as to violations of R.C. 1707.44(B) and 1707.44(J). Thus, former count forty-two of the original indictment parallels count eighty-three of the amended

"2. Defendant[s] Warner [and Schiebel] misrepresented the extraordinary level of involvement and dependence between Home State and its affiliates and ESM by failure to disclose the nature of the interdependence between ESM and Home State for the economic survival of each entity; the nature of the relationship between Home State, its officers and shareholders and ESM, its officers and shareholders; the nature of the relationship of ESM and Home State in various repurchase and reverse repurchase transactions; the substantial contingent liability and attendant risk of loss to Home State associated with its relationship with ESM and the aforementioned transactions, about which defendant[s] Warner [and Schiebel] had actual knowledge based upon * * * [their] understanding of the financial condition of ESM; and the mischaracterization of the transactions with ESM which had been declared unsafe and unsound by appropriate regulatory authorities who had directed that the transactions between Home State and ESM be reduced or eliminated.

"3. Defendant[s] Warner [and Schiebel] misrepresented the relationship of ESM and Home State in various repurchase and reverse repurchase transactions by failure to adequately disclose: (1) the nature of ESM as a principal in the various repurchase and reverse repurchase transactions; and (2) the substantial financial exposure of Home State in these transactions known to defendant[s] Warner [and Schiebel] by virtue of * * * [their] understanding of ESM's financial condition; and (3) the regulatory challenges to the transactions by the State of Ohio and officials of the Ohio Deposit Guarantee Fund, including directives that the transactions should be substantially reduced or eliminated.

"4. Defendant[s] Warner [and Schiebel] misrepresented the substantial contingent liability and attendant risk of loss to Home State associated with its relationship with ESM and the aforementioned transactions by failure to disclose Home State's inability to unwind its transactions with ESM due to ESM's financial condition and Home State's reliance on income from ESM's investments in order to survive and continue its daily operations.

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indictment and count forty-four of the original indictment parallels count eighty-five of the amended indictment. The bill of particulars included separate, virtually identical paragraphs relating to Warner and Schiebel, respectively.

"5. Defendant[s] Warner [and Schiebel] made or caused to be made false representations in the Offering Circular by supervising, directing, and assisting and aiding in the preparation of the Offering Circular. Defendant[s] Warner's [and Schiebel's] participation in the preparation of the Offering Circular included * * * [their] participation in conversations and meetings with Home State's employees in which the format and contents of the Offering Circular and its transmittal letter were discussed and determined. Defendant[s] Warner [and Schiebel] also directed Home State employees in * * * [their] duties in connection with the Offering Circular and instructed them concerning changes in the Offering Circular and its transmittal letter."

Clearly, the portions of the amended indictment and bill of particulars which discuss Warner's and Schiebel's failure to disclose certain material facts only illustrate the defendants' conduct in making *affirmative misrepresentations* in the offering circular. The thrust of the state's case as to counts eighty-three and eight-five was that the defendants represented to potential debenture purchasers that Home State dealt with ESM at arm's length, that ESM's margin calls on Home State were directly related to market forces, that Home State's success in day trades was the result of management's success in calculating the market, and that ESM was merely an agent in the repurchase transactions. Moreover, the state presented evidence that showed the defendants falsely represented unaudited financial statements in the offering circular to be an accurate financial account of Home State. All together, the affirmative misrepresentations by the defendants far outweighed any elements of nondisclosure. Obviously, when a party has made affirmative misrepresentations there will invariably also be items he has left undisclosed.

Thus, in reviewing the amended indictment and bill of particulars, we find that the state's case against Warner and Schiebel was based primarily on affirmative misrepresentations rather than nondisclosure.

Even assuming, *arguendo*, that the state's case was premised on the defendants' failure to disclose relevant and material information, R.C. 1707.44(B)(4) and 1707.44(J) would not require an instruction on duty to disclose. Neither R.C. 1707.44(B)(4) nor 1707.44(J) includes among possible violations the omission or nondisclosure of

material facts. Instead, R.C. 1707.44(B) states that a defendant commits a violation when he or she "* * * knowingly make[s] or cause[s] to be made any false representation[s] * * *." Similarly, R.C. 1707.44(J) is triggered when a defendant has "* * * with purpose to deceive, * * * [made], issue[d], publish[ed], or cause[d] to be made, issued, or published any statement or advertisement as to the value of securities or as to alleged facts affecting the value of securities * * *." There is no language within either section which indicates that a defendant could be charged with omissions rather than affirmative misrepresentations. R.C. 1707.44(B)(4) and (J) prohibit only affirmative misrepresentation; they do not apply to fraudulent nondisclosure.

The elements of a crime must be gathered wholly from the statute. State v. Cimpritz (1953), 158 Ohio St. 490, 49 0.0. 418, 110 N.E. 2d 416, paragraph two of the syllabus; *Davis v. State* (1877), 32 Ohio St. 24, 28. Therefore, we must presume that if the General Assembly intended that a party be held accountable for a failure to disclose under R.C. 1707.44(B)(4) or 1707.44(J), it would have included the appropriate language in the statute. See, e.g., R.C. 1707.44(D) ("No person who is an officer, director, or trustee of, or a dealer for, any issuer, and who knows such issuer to be insolvent in that the liabilities of such issuer exceed its assets, shall sell any securities of or for any such issuer, *without disclosing the fact* of such insolvency to the purchaser" [emphasis added]); Section 240.10b-5(b), Title 17, C.F.R. (which is similar to R.C. 1707.07[B] and 1707.07[J] and which provides that it shall be unlawful in a securities transaction "[t]o make any untrue statement of a material fact or to *omit* to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading[.]" [Emphasis added.]).

B

The state also contends in its fifth proposition of law that a written instruction on duty to disclose was not necessary pursuant to R.C. 1707.44), a violation of which was charged in count eighty-six, since only affirmative misrepresentations were averred at trial rather than defendants' failure to disclose material and relevant facts.

R.C. 1707.44(G) provides: "No person in selling securities shall knowingly engage in any act or practice which is, in sections 1707.01 to 1707.45 of the Revised Code, declared illegal, defined as fraudulent, or prohibited." The definition of fraud in R.C. 1707.01(J), states: "'Fraud,' 'fraudulent acts,' 'fraudulent practices,' or 'fraudulent transactions' means anything recognized on or after July 22, 1929, as such in courts of law or equity; any device, scheme, or artifice to defraud or to obtain money or property by means of any false pretense, representation, or promise; any fictitious or pretended purchase or sale of securities; and any act, practice, transaction, or course of business relating to the sale of securities which is fraudulent or which has operated or would operate as a fraud upon the purchaser."[17] Taking this definition into account we shall inquire as to the scope of the duty to disclose where fraud is alleged. In Ohio, a duty to disclose was first recognized in the case of *Miles v. McSwegin* (1979), 58 Ohio St. 2d 97, 99, 12 0.0. 3d 108, 110, 388 N.E. 2d 1367, 1369. In *Miles*, prospective home buyers brought an action against a real estate broker and a savings and loan company alleging that the defendants concealed the presence of termites on the premises. The court held that "[o]ne of the interests protected by the law of deceit is 'the interest in formulating business judgments without being misled by others * * *' into making unwise decisions which result in financial loss. * * * It is well established that an action for fraud and deceit is maintainable not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction to fully disclose facts of a material nature where there exists a duty to speak." (Citations omitted.) *Id.* See, also, *Prosser & Keeton*, The Law of Torts (5 Ed. 1984), 738-739, Representation and Nondisclosure, Section 106; 37

[17] Ohio courts have recognized fraud to include: (1) representation, or where there is a duty to disclose, concealment, of a matter of fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Gains v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St. 3d 54, 55, 514 N.E. 2d 709, 712; *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St. 3d 69, 23 OBR 200, 491 N E. 2d 1101, paragraph two of the syllabus; *Cohen v. Lamko, Inc.* (1984), 10 Ohio St. 3d 167, 10 OBR 500, 462 N.E. 2d 407 *Moore v. Fenex, Inc.* (C.A.6, 1987), 809 F. 2d 297, 301; *Dunn Appraisal Co. v. Honywell Information Systems, Inc.* (C.A.6. 1982), 687 F. 2d 877, 882.

American Jurisprudence 2d (1968) 196-201, Fraud and Deceit, Sections 144 and 145; *First Natl. Bank of Toledo v. Stewart Petroleum & Drilling Corp.* (Aug. 17, 1984), Lucas Cty. App. No. L-84-017, unreported.

In *Chiarella v. United States* (1980), 445 U.S. 222, the United States Supreme Court discussed the possible situations where a duty to disclose arises. The *Chiarella* court construed Section 10(b) of the Securities Exchange Act of 1934, Section 78j, Title 15, U.S. Code, in an instance where a financial printer, who was engaged by certain corporations to print corporate takeover bids, deduced the names of the target companies from documents delivered to the printer by the acquiring companies and, without disclosing his knowledge, purchased stock in the target companies and sold it immediately after the takeover attempts were made public. *Id.* at 224-225. In holding that the defendant was not under a duty to disclose, the *Chiarella* court explained:

"* * * [O]ne who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.' * * *" (Footnote omitted.) *Id.* at 228.

Furthermore, the court noted that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak. * * *" *Id.* at 235.

There is some question as to whether an allegation of fraud requires an instruction on duty to disclose. In *Miles v. McSwegin, supra*, this court held that "* * * a party is under a duty to speak, and therefore liable for nondisclosure, if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading. * * *" Id. at 100, 12 O.O. 3d at 110, 388 N.E. 2d at 1369, citing 3 Restatement of the Law 2d, Torts (1965) 119, Section 55(1) and (2).

Therefore, since nondisclosure can be a fraudulent act under Ohio law, we hold that R.C. 1707.44(G) prohibits not only affirmative misrepresentation but also fraudulent nondisclosure where there is a duty to disclose. However, a defendant is not entitled to a jury instruction on nondisclosure and duty to disclose unless the state's case is premised on nondisclosure.

In the case *sub judice*, the thrust of count eighty-six of the amended indictment does not rely upon nondisclosures by Warner.[18]

[18] Count eighty-six of the amended indictment, as to Warner and Schiebel, provides, in pertinent part:

"(7) The Defendants

"MARVIN L. WARNER, and

"DAVID J. SCHIEBEL,

"Commencing on or about June 1, 1984 and extending through November, 1984 at the County of Hamilton, State of Ohio, in violation of Section 1707.44(G) of the Ohio Revised Code, did, in selling securities of the Bank offered by means of the Offering Circular, knowingly engage in acts or practices which were declared illegal, defined as fraudulent or prohibited in Sections 1707.01 to 1707.45 of the Revised Code, a fourth degree felony, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

"(8) The Defendants knowingly engaged in acts or practices which were defined as fraudulent in Section 1701.01 of the Ohio Revised Code in that the Defendants obtained the property of purchasers of the Bank's securities by means of false representations contained in the Offering Circular. The Defendants did prepare, review, revise, supervise, direct, assist and aid in the preparation of the Offering Circular which contained misrepresentations of material and relevant facts, and did assist, supervise, direct and aid in the sale of the securities offered by means of the Offering Circular. The use of the Offering Circular and the misrepresentations contained therein constituted an act, practice, or course of business relating to the sale of securities which was fraudulent and which operated as a fraud upon the purchasers in that the purchasers were not provided with information material and relevant to an adequate understanding of the financial condition of the Bank and to an evaluation of their investment in the Bank's securities.

"(9) Defendant DAVID J. SCHIEBEL did knowingly engage in acts or practices which are defined as fraudulent in Section 1701.01 of the Ohio Revised Code in that Defendant DAVID J. SCHIEBEL did obtain the Superintendent's and Fund's approval of the Merger by means of false disclosures and misrepresentations to the Fund and to the Superintendent concerning the existence or status of Registration Statement No. 2-88983 (the 'Registration Statement') then on file with the United States Securities & Exchange Commission and the difficulties encountered therewith. Defendant DAVID J. SCHIEBEL did obscure information with respect to the

Instead, it alleged that Warner had engaged in fraudulent practices by preparing an offering circular which misrepresented material and relevant facts, and did assist, supervise, direct, and aid in the sale of the securities offered by the offering circular. Essentially, the bill of particulars restates count eighty-six in the amended indictment. In describing Warner's actions, the bill of particulars states in pertinent part:

"* * * His conduct arises from his approving the Offering Circular which contained misrepresentations concerning Home State's relationship with ESM as * * * [discussed in the indictment], and overvaluation of Home State's assets on the financial statement set forth in the Offering Circular, including overvaluation of such items as loans and receivables and real estate."

Obviously, the failure of Warner to disclose the financial condition of Home State was incidental to the affirmative misrepresentation of Home State's status alleged in the amended indictment and the bill of particulars. Taken as a whole, the bill of particulars alleges only that Warner committed fraud by affirmative misrepresentations rather than by failing to disclose.

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existence and status of the Registration Statement for the express purpose of obtaining approval of the Merger, which Merger (i) allowed the debentures identified in paragraph (2) of this Count Eighty-Six to become the direct obligations of the Bank, in circumvention of the Fund's restrictions on the payment of dividends by the Bank to its parent, thereby making the liquidity of the Bank available to pay amounts due on the debentures; (ii) avoided the necessity of further pursuit of the Registration Statement with federal and state authorities as a condition to the issue of the Bank of new debentures; (iii) allowed the issuance of debentures without registration and disclosure of information required in registration with the United States Securities & Exchange Commission and the Ohio Division of Securities. The foregoing actions by Defendant DAVID J. SCHIEBEL constituted a scheme, acts or a course of business which related to the sale of securities offered by means of the Offering Circular, which was fraudulent and which operated as a fraud upon the purchasers of the Bank's securities in that the purchasers were not provided with information material and relevant to an adequate understanding of the financial condition of the Bank and to an evaluation of their investment in the Bank's securities.

"(10) The Defendants MARVIN L. WARNER, and DAVID J. SCHIEBEL in selling securities of the Bank offered by means of the Offering Circular, knowingly engaged in acts or practices which were declared illegal or prohibited in Sections 1707.44(B) * * * of the Revised Code, as described more fully in * * * [Count] Eighty-Three * * * of this Indictment."

Thus, it can be seen from the allegations contained in the amended indictment and bill of particulars that any instruction regarding Warner's duty to disclose material and relevant information would have been error. Consequently, the trial court erred in giving the following oral instruction to the jury regarding the duty to disclose:

"In counts 83, 85, and 86, in regard to — fraudulent misrepresentation is when an allegation of fraud is based upon no disclosure. There can be no fraud absent a duty to speak by one charged of engaging in the fraud."

As stated in our previous discussion, any instruction on the duty to disclose, oral or written, would have been improper in this case; therefore, the trial court erred in giving the above instruction to the jury. Accordingly, we must determine whether such error was prejudicial to the defendants.

In State v. Price (1979), 60 Ohio St. 2d 136, 14 0.0. 3d 379, 398 N.E. 2d 772, paragraph four of the syllabus, we held that: "A single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge. (*Cupp v. Naughten*, 414 U.S. 141, 147 followed.)" See, also *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St. 3d 27, 31, 516 N.E. 2d 226, 230; *State v. Coleman, supra*, at 290, 525 N.E. 2d at 797; cf. *Lakes v. Ford* (C.A. 11, 1986), 779 F. 2d 1578, *Francis v. Franklin* (1985), 471 U.S. 307. Upon review of the entire set of instructions given to the jury, it is clear that the jury was not instructed as to Warner's duty to disclose material and relevant facts in the main but, rather, it was instructed to decide whether defendant made affirmative misrepresentations as to Home State's status. Even if we were to assume that the jury was instructed that it had to determine whether defendant was under a duty to disclose, this would not have been prejudicial to the defense. As noted in our previous discussion, the defense was not entitled to such an instruction. Therefore, any oral instruction on this issue was prejudicial to the state and not to the defense. And, since the defendant was not entitled to the instruction in the first place, there would have been no prejudice even if this part of the instructions was not reduced to writing.

Accordingly, the state's fifth proposition of law is sustained, while Warner's twelfth proposition of law is overruled.

V.
Culpable Mental State under R.C. 1707.29 as Applied to R.C. 1707.44

In Warner's thirteenth proposition of law, defendant argues that R.C. 1707.29 creates a mandatory presumption of knowledge which violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. He alleges two errors in this vein. First, he claims that R.C. 1707.29 establishes a presumption of knowledge which relieves the state of its burden of proof on that essential element of its case against him. Second, he claims that the trial court improperly instructed the jury that under R.C. 1707.29 defendant could be presumed to have knowledge of certain facts. For the reasons that follow, we find this argument to be without merit.

Warner was convicted of three securities violations under R.C. 1707.44. All three counts contained the element of knowledge. In any prosecution brought under R.C. 1707.01 through 1707.45 (which included the counts against Warner), R.C. 1707.29 provides that "the accused shall be deemed to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge."

In construing the language contained in R.C. 1707.29, the court in *State v. Walsh* (1979), 66 Ohio App. 2d 85, 95-96, 20 O.O. 3d 178, 184-185, 420 N.E. 2d 1013, 1020, held that "* * * although R.C. 1707.44(G) utilizes the word 'knowingly,' R.C. 1707.29 has the general effect of defining 'knowingly' more in terms of 'negligently' as defined by R.C. 2901.22(D), rather than 'knowingly' as defined by R.C. 2901.22(B). Thus, for the purpose of fraudulent acts in selling securities in violation of R.C. 1707.44(G), a person is criminally liable if he represents facts to be different than he should have known them to be if he had exercised reasonable diligence to ascertain the facts. On the other hand, of necessity, a good-faith belief in the existence of the fact as represented creates no criminal liability, since one cannot have a good-faith belief in facts which he should know to be otherwise had he exercised reasonable diligence. Good faith necessarily implies the exercise of reasonable diligence to ascertain the true state of facts.

"There remains, however, a very important issue for the jury to determine, *i.e.*, whether the defendant should have learned the true nature of the facts in the exercise of reasonable diligence. First, it must be ascertained whether defendant exercised reasonable diligence to ascertain the true state of facts; and, second, it must be determined whether he should, not merely could, have learned of the true facts in the exercise of reasonable diligence. This is not a situation where one fact is presumed to exist because of the existence of another; but, instead, in the context of this case, the jury is required to make a factual determination of whether the defendant represented the facts to be different than he should have known them to be, in the exercise of reasonable diligence. This in no way infringes upon the presumption of innocence, since the state is required to prove, beyond a reasonable doubt, that the defendant in the exercise of reasonable diligence should have known the facts to be different than he represented them to be. Actually, there is little difference between this standard and the standard that is ordinarily used, since it is permissible to infer that a defendant has knowledge of facts which he should have known under the circumstances involved. * * *"

We are persuaded by the *Walsh* rationale which interprets the legislative intent of R.C. 1707.29 to, in effect, define the knowledge requirement for certain violations of Ohio's Securities Act, R.C. Chapter 1707. Thus, instead of creating a presumption as alleged by Warner, R.C. 1707.29 merely sets forth what the term knowledge encompasses for purposes of criminal liability under R.C. Chapter 1707. Therefore, we hold that under R.C. 1707.44(B)(4), (G), and (J), a person is criminally liable if he represents facts to be different than he should have known them to be if he had exercised reasonable diligence to ascertain the facts prior to the commission of the offense.

In the case *sub judice*, after reciting R.C. 1707.29, the trial court instructed the jury as follows:

"The following is an explanation of the application of Section 1707.29. You as the jury must determine whether or not the defendant or the defendants should have learned the true nature of the facts represented by them in conjunction with the sale of securities in the exercise of reasonable diligence.

"First, it must be ascertained whether the defendant or defendants exercised reasonable diligence to determine the true state of facts; and, second, it must be determined whether he or they should, not merely could, have learned of the true facts in the exercise of reasonable diligence. It is your duty to determine if the defendant or the defendants represented the facts to be different than he or they should have known them to be in the exercise of reasonable diligence.

"Reasonable diligence is due diligence of a character exercised by a fair and ordinarily prudent person under the same or similar circumstances.

"In other words, a defendant or the defendants knew of the existence of material and relevant facts if, by the exercise of reasonable diligence, he or they should have known of their existence.

"Thus, for the purposes of an application of 1707.29 to the 1707.01 to 107.45 alleged violations, a person is criminally liable if he represents facts to be differerent [*sic*] than he should have known them to be if he had exercised reasonable diligence to ascertain the facts.

"On the other hand of necessity, a good faith belief in facts which he should know to be otherwise had he exercised reasonable diligence to ascertain the true state of facts. [*Sic.*]

"A false representation, a false representation is a representation which is untrue, knowingly made to deceive another, a representation of what is true, which nevertheless—or it should be a representation of what is true, which nevertheless creates an impression of that which is false.

"A false representation may arise from any conduct capable of being turned into a statement of fact by a person of ordinary prudence. Thus, a false representation may be made by conduct calculated and intended to produce a false impression as well as by words.

"Such conduct may include the manner in which material facts were presented. If you find the offering circular involved conduct calculated to and amounting to a false representation intended to deceive purchasers of the debentures, such false representation could be the basis for a finding of guilty."

Accordingly, the trial court properly instructed the jury on the requisite culpable mental state for purposes of violating R.C. 1707.44(B)(4), (G), and (J).

If we were to accept Warner's contention that the jury instructions on R.C. 1707.29 were erroneous, we would still need to determine whether such instructions were harmless error. See *Carella v. California* (1989), 491 U.S. ___, 105 L. Ed. 2d 218, 222, 109 S. Ct. 2419, 2421 ("'In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury .... In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt'") citing *Rose v. Clark* (1986), 478 U.S. 570, 580-581. After reviewing the instructions, we hold that even if the trial court shifted the burden from the prosecution on an essential element of the case, the error was harmless beyond a reasonable doubt because the predicate facts conclusively established knowledge on the part of Warner, so that no rational juror could find that Warner made the misrepresentations without the knowledge required by R.C. 1707.44. As noted in our recitation of the facts, Warner was involved in almost every facet of the internal operations of the bank. He was kept informed of all policy decisions by the board of directors. Warner's actions were shown to be calculated and deceitful. Therefore, any claim that Warner committed the act without the requisite knowledge is unsupported.

Therefore, for the foregoing reasons, we overrule Warner's thirteenth proposition of law.

VI
App. R. 9(E)
Correction of the Record

In the state's fourth and sixth propositions of law and Warner's ninth, tenth, eleventh and fourteenth propositions of law, the issues concern the procedure for giving certain instructions to the jury, whether a supplemental record of the instructions was properly made, the trial court's refusal to show the written jury instructions to defense

counsel prior to their submission to the jury,[19] and the constable's *ex parte* communications with the jury. We note with respect to the *ex parte* communications that Warner's attorneys were present when the trial judge left his chambers to order the additional instructions given to the jury. Warner does not assert, nor does the record indicate, that he objected to the trial court about this procedure or that a request was made that the jury be recalled for a formal presentation of the additional written instructions in open court. For the reasons stated in *State v. Schiebel, supra*, at Part II of case No. 90-85, we sustain all of the state's propositions of law and overrule Warner's propositions of law on this issue.

VII
Jury Instructions

In Warner's tenth proposition of law, he argues that there were variations between the oral instructions and the written instructions.

In Part IV of this opinion, we found that there was no requirement to give an instruction on the duty to disclose based on the charges for violating R.C. 1707.44(B), (G), or (J). Therefore, if such a written instruction did not make its way to the jury, no error occurred. If the instruction did go to the jury, it would have benefited the defense and been harmful to the prosecution.

Furthermore, we have reviewed Warner's other claims regarding alleged variations and find them to be meritless.

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[19] We find no prejudice from Warner's inability to review the trial court's written instruction on motive to the effect that a good motive or "purpose" was no defense to the crime of unauthorized acts or wilful misapplication of funds. We agree with the court of appeals' conclusion that only with respect to the offense of wilful misapplication was the jury instructed both that purpose is an element of the offense and that a good purpose was not a defense. Thus, the jury was adequately instructed as to the elements and defenses of both crimes. However, we note that there is no need for an instruction on good motive not being a defense to unauthorized acts, since the statute only requires a culpable mental state of recklessness.

Therefore, given Warner's acquittal on all the counts alleging wilful misapplication of funds, we find no prejudicial error and overrule Warner's ninth and tenth propositions of law as they relate to this issue.

Accordingly, for the above-stated reasons and those expressed on this issue in *State v. Schiebel, supra*, at Part IV of the cross-appeal in case No. 90-85, Warner's tenth proposition of law is not well-taken.

VIII
Fedwire Transfers

In the state's third proposition of law and Warner's proposition of law eight, the issue is whether an unauthorized transfer of a savings and loan association's assets through the Fedwire[20] system constitutes

[20] The Federal Reserve System ("Fed") provides a mechanism, called Fedwire, for transferring funds without using paper checks. Through the use of telephonic communications, computer processing, and other technological advances, the system can quickly transfer funds in large amounts across the country. All such transfers are completed on the same day, usually in a matter of minutes, and are guaranteed final when the receiving institution is notified of the credit to its account. Fedwire may be used by depository institutions to transfer funds from their own account that result from purchases or sales of federal funds, to meet balances at correspondent banks, and to send funds to another institution on behalf of customers. Transfers on behalf of customers include funds associated with the purchase or sale of securities, the replenishment of business demand deposits, and other time-sensitive payments. The Treasury Department and other federal agencies use Fedwire extensively to disburse and collect funds. The average transaction exceeds one million dollars, and the service handles billions of dollars in transactions each day. Its use has increased as a result of business customers seeking close control and management of their funds. Users can make transfers either by telephone or through on-line computer linkups. For example, in 1986 the number of funds transfers increased by 10.6 percent over the prior year for a total of 49,900,000 transactions. 73 Bd. of Governors, Fed. Reserve Sys. Ann. Rep. 210 (1987); Schroeder, Bank Officer's Handbook of Commercial Banking Law (6 Ed. 1989), 3-36 to 3-37, Section 3.04[5][b].

Unlike the telex, for example, which only transmits the instruction to pay, a Fedwire transmits both the message and the underlying funds. Thus, the Fed participates directly in the settlement of interbank obligations and provides settlement services as well as communication services.

Currently, the rules governing the Fedwire are contained in Subpart B of Regulation J contained in Sections 210.25 to 210.38, Title 12, C.F.R. issued by the Board of Governors of the Federal Reserve System as supplemented by operating circulars issued by each Federal Reserve Bank.

Settlement in Fedwire is bilateral. The Fed debits and credits Fed accounts on each separate message moving through the system. While the Fed permits some senders of Fedwires to overdraw their accounts during the day, the finality of a Fedwire payment is not conditional on the sender's covering the "daylight" overdraft. Regula-

the assignment, transfer or delivery of a draft or other written instrument pursuant to R.C. 1153.01.

The state contends that between the months of May and October 1983, Warner caused a total of $114,000,000 of Home State's assets to be transferred on forty-one separate occasions, all of which violated Home State's board of directors' resolution dated April 28, 1983. All these funds were paid over the Fedwire system. R.C. 1153.01 provides:

"No president, director, trustee, committee member, secretary, treasurer, attorney, or other officer or agent of a building and loan association shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association; nor shall he issue or put into circulation a warrant or other order, or assign, transfer, cancel, or deliver a note, bond, draft, mortgage, judgment, decree or other written instrument belonging to the association, or raise or receive money for and in the name of such association, unless authorized to do so by its board of directors."

The indictment, however, charged only that Warner did "assign, transfer or deliver a note, bond, draft or other written instrument"; it did not charge with the statutory language that he did "issue or put into circulation a warrant or other order."

Thus, the issue before this court is whether these Fedwire transfers violated that part of R.C. 1153.01 charged in the indictment. Warner asserts that a wire transfer is not a written instrument within the meaning of R.C. 1153.01, as it is neither "written" nor an "instrument" as those words are commonly used.

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tion J provides that a transfer is "finally paid" when "the transferee's Reserve Bank sends the transfer item or telephones the advice of credit for the item to the transferee, whichever occurs first. Section 210.36(a), Title 12, C.F.R. Since the credit to the recipient depository institution's account is not conditional and occurs almost simultaneously with the receipt of the transfer instruction by the Fed, and because it is practically impossible for a Reserve Bank to fail, Fedwire credits are "good funds." Indeed, they are the best funds a transferee can have. Scott, Corporate Wire Transfers and the Uniform New Payments Code (1983), 83 Col. L. Rev. 1664, at 1669-1670.

Although the number of wire transfers each year is quite small in relation to checks (one to two hundred thirty-five), when something goes wrong on a wire transfer, a great deal of money ($3,500 to $1) is typically at stake. Almost all transfers are settled through a reserve account at the Federal Reserve Bank. See Vergari & Shue, Checks, Payments, and Electronic Banking (1986), 524, fn. 33.

Since this issue is one of first impression for this court, we will consider how other jurisdictions have applied laws drafted primarily to address traditional written documents, such as checks, but applied to modern wire transfers. In *Richards v. Platte Valley Bank* (C.A.10, 1989), 866 F. 2d 1576, the United States Court of Appeals decided that the word "check" as used in the Uniform Fiduciaries Act could be interpreted to include wire transfers of funds. The *Richards* court stated:

"We believe wire transfers are analogous to checks for application of the Uniform Fiduciaries Act. The transfer of funds by cable or telegraph is in law a check. *Lourie v. Chase Nat'l Bank*, 42 N.Y.S. 2d 205, 206 (Sup. Ct. 1943). See also *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F. 2d 1047, 1051 (2d Cir. 1979) (wire transfers have been treated as analogous to checks in determining whether a transfer is irrevocable).* * *

"* * *

"* * * The transfer item must be in some form of writing, such as letter, telegram or magnetic disc. 12 C.F.R. 210.28. Wire transfers are considered irrevocable after transmission. *Delbrueck*, 609 F. 2d at 1051.

"The wire transfer requirements [see Sections 210.25 to 210.38, Title 12, C.F.R.] are similar to the definition of a check under the Uniform Commercial Code. A check is defined as a draft drawn upon a bank and payable on demand, signed by the maker or drawer, containing an unconditional promise to pay a sum certain in money to the order of the payee. * * * A wire transfer is a written order to pay, drawn upon a bank containing an unconditional promise to pay a sum certain in money to the order of the beneficiary. The only element missing is the maker's signature. We do not consider this element significant for purposes of excluding wire transfers from the operation of the Uniform Fiduciaries Act." Id. at 1580-1581.

Although the Uniform Commercial Code is not directly applicable to this case due to the nature of the transfer, analogous use of its concepts supports the proposition that wire transfers are written instruments for purposes of R.C. 1153.01. *Delbrueck & Co. v. Mfrs. Hanover Trust Co.* (C.A.2, 1979), 609 F. 2d 1047,1051 ("[t]he Uniform Commercial Code ['UCC'] is not applicable to this case

because the UCC does not specifically address the problems of electronic funds transfer. However, analogous use of concepts such as the finality of checks once 'accepted' (§§ 3-410, 4-303) would support the irrevocability of these transfers"); *Securities Fund Services v. Am. Natl. Bank & Trust Co.* (N.D. Ill. 1982), 542 F. Supp. 323, 326-328; cf. *Evra Corp. v. Swiss Bank Corp.* (C.A.7, 1982), 673 F. 2d 951, 955 ("[m]aybe the language of Article 4 [of the Uniform Commercial Code] could be stretched to include electronic fund transfers, see section 4-102(2), but they were not in the contemplation of the draftsmen.")

In *Illinois, ex rel. Lignoul, v. Continental Ill. Nat'l. Bank & Trust Co. of Chicago* (C.A.7, 1976), 536 F. 2d 176, certiorari denied (1976), 429 U.S. 871, the United States Court of Appeals, Seventh Circuit, decided that making an electronic transfer of funds through a computer terminal was essentially the same as issuing a check. The *Lignoul* court observed:

"The check is merely the means used by the bank to attain the desired objective, *i.e.*, the payment of the money to its customer. The card serves the same purpose as the check. It is an order on the bank. Any order to pay which is properly executed by a customer, whether it be check, card or electronic device, must be recognized as a routine banking function when used as here. The relationship between the bank and its customer is the same. Indeed, the trial court here recognized this when it characterized a CBCT [Customer Banking Communication Terminal] withdrawal as the 'functional equivalent' of a written check. * * *

"* * *

"* * * There are many ways in which an order may be given and one way of late is by computer record. *Transport Indemnity Co. v. Sieb*, 178 Neb. 253, 132 N.W. 2d 871(1965). And the Ninth Circuit accepts the same concept that computer impulses constitute sufficient writing to meet the order test. *United States v. DeGeorgia*, 9 Cir., 420 F. 2d 889 (1969)." *Id.* at 178; see, generally, Clarke, An Item Is An Item Is An Item: Article 4 of the UCC and the Electronic Age (1969), 25 Bus. Law. 109, 112.

In reviewing federal regulations on this issue, we note that the reporting requirements for financial institutions recognize that a wire

transfer falls within the general category of a written instrument. Specifically, in Section 103.11(p), Title 31, C.F.R., a "transaction in currency" is described as:

"A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part."

In turning to the case *sub judice*, we begin with the general rule of statutory construction that criminal statutes should be strictly construed against the state in criminal prosecutions. R.C. 2901.04(A). However, we are mindful that "[t]he canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly. *United Sates v. Moore* (1975), 423 U.S. 122, 145; *United States v. Brown* (1948), 333 U.S. 18, 25-26." *State v. Sway* (1984), 15 Ohio St. 3d 112, 116, 15 OBR 265, 268, 472 N.E. 2d 1065, 1068. Thus, the rule of *ejusdem generis* should not be invoked to defeat the obvious purpose of a legislative enactment.

In today's modern banking environment, electronic transfers have become commonplace.[21] On an average day, six hundred billion dollars in funds are transferred by wire or electronic means. Vergari

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[21] As noted in the Official Comments to U.C.C. 4A-102:

"* * * The funds transfer governed by Article 4A is in large part a product of recent and developing technological changes. Before this Article was drafted there was no comprehensive body of law — statutory or judicial — that defined the judicial nature of a funds transfer or the rights and obligations flowing from payment orders. Judicial authority with respect to funds transfers is sparse, undeveloped and not uniform. Judges have had to resolve disputes by referring to general principles of common law or equity, or they have sought guidance in statutes such as Article 4 which are applicable to other payment methods. But attempts to define rights and obligations in funds transfers by general principles or by analogy to rights and obligations in negotiable instrument law or the law of check collection have not been satisfactory."

We recommend that the General Assembly consider legislation such as UCC 4A-102 in light of today's modern banking environment and in order to avoid sometimes strained interpretations of Ohio UCC Article IV.

& Shue, Checks, Payments and Electronic Banking (1986) 529. This vastly exceeds the amount transferred by check. See Scott, Corporate Wire Transfers and the Uniform New Payments Code (1983), 83 Col. L. Rev. 1664. As noted in the discussion above, under modern day conditions, transferring assets of a savings and loan association over the Fedwire is the equivalent of sending a check or issuing a draft.

Through R.C. 1153.01, the General Assembly clearly intended to criminalize the unauthorized transfers of an association's assets regardless of form. Thus, the transfer of funds through the Fedwire system qualifies as a "draft" or other "written instrument" as those terms are used in R.C. 1153.01. Accordingly, the court of appeals' conclusion that the unauthorized transfer of Home State's assets over the Fedwire did not constitute a writing within the meaning of R.C. 1153.01 was erroneous.

Therefore, for the reasons cited in the above analysis, the state's third proposition of law is sustained, and Warner's seventh proposition of law is overruled.

IX
Culpable Mental State Under R.C. 1153.01

In his fourth proposition of law, Warner asserts that the trial court failed to properly instruct the jury that in order to find Warner in violation of R.C. 1153.01, it would have to determine that he intended to injure or defraud Home State.

R.C. 1153.01 does not on its face provide the degree of culpability necessary in order to be found guilty of unauthorized acts, nor does it plainly indicate a purpose to impose strict liability. Although a "willful" or "purposeful" state of mind could arguably be an element of a charge of willful misapplication of funds under the first clause of R.C. 1153.01, there is no way to construe the second clause of the statute to impose such a requirement for conviction for unauthorized acts. Thus, we must determine what mental state is necessary for a conviction under the second clause.

As a general rule of construction, "[a] statute defining an offense, which is silent on the question of intent, thereby indicates the purpose

of the General Assembly to make proof of a specific intent unnecessary, and, therefore, proof of a general intent to do the proscribed act is sufficient[.] * * *" *State v. Lisbon Sales Book Co.* (1964), 176 Ohio St. 482, 27 0.0. 2d 443, 200 N.E. 2d 590, paragraph two of the syllabus; see, also, *State v. Bentz* (1981), 2 Ohio App. 3d 352, 353, 2 OBR 408, 409, 442 N.E. 2d 90, 92. Furthermore, R.C. 2901.21(B) sets forth the requirements for criminal liability by providing in part: "* * * When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, *recklessness* is sufficient culpability to commit the offense." (Emphasis added.) A person acts recklessly when, "with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C). Thus, in the absence of the specification of a culpable mental state in R.C. 1153.01, we hold that the culpable mental state for unauthorized acts in violation of R.C. 1153.01 is recklessness.

In the case *sub judice*, the trial court declined to instruct the jury that the requisite mental state for the offense of unauthorized acts was "intent to injure or defraud," as charged in the indictment.[22] Instead, the court charged the jury that "[f]or the assigning, transferring, cancelling or delivering of a note, draft, bond, mortgage, judgment, decree or other written instrument belonging to the association or raising or receiving money and in the name of the association without the authorization of the board of directors, the culpable mental state is recklessness." Accordingly, since we have determined that the culpable mental state for unauthorized acts is recklessness, the jury in this case was properly instructed in accordance with the law. Therefore, Warner's fourth proposition of law is overruled.

In Warner's fifth proposition of law, he maintains that the trial court's instruction to the jury was inconsistent with the indictment.

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[22] Even-numbered counts two through eighty-two, charging the defendants with unauthorized acts, allege that Warner and Schiebel, "as officers, agents or directors of * * * [Home State], with the intent to injure or defraud the Bank, did * * * assign, transfer or deliver a note, bond, draft or other written instrument belonging to the Bank * * * to ESM, without the authorization of the Bank's Board of Directors* * *."

In even-numbered counts two through eighty-two, the grand jury indicted Warner and others for unauthorized acts, stating that they committed the acts "with the intent to injure or defraud the Bank." However, as just decided in our discussion of Warner's fourth proposition of law, the culpable mental state for unauthorized acts in violation of R.C. 1153.01 is recklessness. *State v. Bentz, supra*; R.C. 2901.21(B); see, also, *State v. Lisbon Sales Book Co., supra*.

R.C. 1153.01 does not, on its face, state the culpable mental state for committing the offense. Instead, reference must be made to other statutes and case law. See *State v. Lisbon Sales Book Co., supra; State v. Bentz, supra*; R.C. 2901.21(B). Therefore, we will not impose hypertechnical requirements not already required for an indictment or complaint. It is not necessary to set forth the specific degree of culpability in an indictment where the statute fails to do so and it can readily be gleaned by reference to other statutes or case law. Consequently, we hold that the indictment, although misstating the correct degree of culpability for violating R.C. 1153.01, did meet minimal constitutional standards.

Therefore, Warner's fifth proposition of law is overruled.

X
Ratification under R.C. 1153.01

In his sixth proposition of law, Warner claims that the trial court erred in failing to instruct the jury that subsequent ratification by the Home State board of directors of the acts charged in even-numbered counts two through eighty-two constituted a defense to the crime of unauthorized acts.

Warner submitted into evidence copies of board reports which had been distributed to and reviewed by the board of directors of Home State at their monthly meetings and which contained the figures necessary to calculate the collateralization rate of the association's repurchase agreements. Based on those reports, Warner and the other defendants requested that the trial court charge the jury that a board of directors may implicitly ratify, and thereby authorize, a previously unauthorized act if the board, with actual knowledge of the facts, either accepted or retained the benefits of the transaction, acquiesced in the

transaction, or failed to repudiate the transaction within a reasonable time. The trial court denied Warner's proposed instruction and, instead, charged the jury that:

"In regard to the authorization of the board of directors, a corporation acts through its board of directors. Corporate actions are required by law to be authorized by the board of directors as a result of resolutions passed at meetings of the board, or they may be authorized or passed upon without a meeting, upon the affirmative vote or approval of, and in a writing or writings signed by all the directors.

"* * *

"You must determine what authority, if any, to manage investments, was delegated to the officers or agents of Home State, and whether that authority was exercised by those officers or agents as was authorized and delegated by the board of directors."

The trial court refused Warner's instruction on ratification based on its determination that the Revised Code *limits* corporate acts to those authorized by resolution passed at a formal meeting of the board of directors or by unanimous written consent of the board. See, generally, R.C. 1701.59, 1701.62 and 1701.54.

A well-settled doctrine of the law of agency is that a principal may ratify the acts of its agent performed beyond the agent's scope of authority, and such ratification relates back to the time of performance of the acts and binds the principal from that time. *State, ex rel. Riley Constr. Co., v. East Liverpool Bd. of Edn.* (1967), 10 Ohio St. 2d 25, 29, 39 0.0. 2d 15, 18, 225 N.E. 2d 246, 249. In *Campbell v. Hospitality Motor Inns, Inc.* (1986), 24 Ohio St. 3d 54, 24 OBR 54, 493 N.E. 2d 239, we concluded that a corporation could be bound to a contract that was neither expressly authorized nor expressly ratified by its board of directors, thus reaffirming the established rule that "an unauthorized contract entered into by a corporate officer or agent may be impliedly ratified by the corporate board of directors where the directors have actual knowledge of the facts and (1) accept and retain the benefits of the contract, (2) acquiesce in it, or (3) fail to repudiate the contract within a reasonable period of time." *Id.* at 57, 24 OBR at 138, 493 N.E. 2d at 242.

However, as succinctly stated by the court of appeals, "[t]he issue before us * * * is not whether a corporation's board of directors may authorize corporate acts in ways other than those prescribed by statute, but whether subsequent action or inaction by the board of directors may relieve an officer, director or other agent charged with unauthorized acts of criminal liability." The overwhelming weight of federal and state authority has rejected the defense of subsequent ratification, whether express or implied, where criminal acts have been alleged (*i.e.*, a violation of the Criminal Code). See, *e.g.*, *United States v. Larson* (C.A.7, 1978), 581 F. 2d 664, 668 fn. 5 (even if bank directors' action was construed as approval of action of bank president in placing bank funds in a noninterest-bearing account in another bank from which president obtained a loan on preferential terms, it would not be defense to a charge against the president of willful misapplication of bank funds, since the misapplication preceded the approval); *United States v. Acree* (C.A.10, 1972), 466 F. 2d 1114, 1118 (refusal by the trial court to admit minutes of meetings of bank's board of directors which generally referred to purchase of poor loans by defendant was not error, since subsequent ratification is no defense in a prosecution for willfully misapplying funds and credits of bank while an officer thereof); *United States v. Cauble* (C.A.5, 1983), 706 F. 2d 1322, 1354 (ultimate restitution is not a defense to the crime of willful misapplication of bank funds, because crime is complete when misapplication occurs); *Rieger v. United States* (C.A.8, 1901), 107 F. 916 (willful misapplication of funds of a bank without knowledge or consent of the bank is not changed, as to its criminal character, by the fact that the act subsequently became known to the officers of the bank, and that they impliedly consented thereto, by taking no action in regard to it); *Simpson v. United States* (C.A.9, 1916), 229 F. 940, 945 ("[t]he criminal act was complete when the certificate of deposit was issued without authority from the directors, and with intent to injure and defraud the association, and no act of the directors could change its character. The doctrine of ratification has but little application to the criminal law"); *Gilbert v. United States* (C.A.9, 1966), 359 F. 2d 285, 287 (the fact that taxpayers whose names the defendant endorsed on government tax-refund checks may have ratified his acts would not have rendered his conduct any less criminal); *Phillips v. State* (1956), 38 Ala. App. 632, 634, 91 So. 2d 518, 519 ("* * * ratification,

condonation, or settlement of a claim by a prosecuting witness subsequent to the commission of the offense will not disturb a criminal prosecution"); *State v. Austin* (1923), 93 W.Va. 704, 117 S.E. 607, paragraph nine of the syllabus ("[w]here accused is charged with forging and uttering a bank check and the undisputed evidence is that the check was not drawn by the accused, but by a third party, no subsequent ratification of the drawing of the check will defeat the right of the state to prosecute for the offense of uttering it knowing it to be a forged instrument * * *"); *State v. Higgin* (1959), 257 Minn. 46, 50, 99 N.W. 2d 902, 906 (condonation or ratification is, ordinarily, no defense to a crime; if defendant had sufficient intent to defraud when he endorsed check in name of employer, employer's subsequent ratification of his act could not constitute a defense to a charge of forgery); *Lewallen v. State* (1958), 166 Tex. Crim. R. 287, 288, 313 S.W. 2d 293, 294 (board of directors of corporation could not ratify defendant's criminal act of embezzlement by acquiescence); *Breaker v. State* (1921) 103 Ohio St. 670, 671, 134 N.E. 479, 480 ("* * * a statutory crime is not a private wrong, but a public wrong; * * * the public, or state, is entirely indifferent to the personal feelings of the owner of property stolen. It is the state that is prosecuting the violation of its statute; on its own behalf, and not on behalf of the owner of the property").

Thus, for the reasons stated above, we find that the trial court properly instructed the jury and, therefore, overrule Warner's sixth proposition of law.

XI
Post-Trial Amendment

In the state's second proposition of law and Warner's seventh proposition of law, the issue is whether the trial court properly allowed the state to amend the indictment subsequent to Warner's conviction in order to reflect additional language contained in R.C. 1153.01.

Even-numbered counts two through eighty-two of the indictment, charging Warner with unauthorized acts, alleged only that he "did * * * assign, transfer or deliver a note, bond, draft or other written instrument belonging to the Bank * * * to ESM, without the authorization of the Bank's Board of Directors; a felony of the fourth degree

* * *." Following the jury's verdict convicting Warner of unauthorized acts charged in even-numbered counts seventy-two through eighty-two, Warner moved pursuant to Crim. R. 29 for acquittal on the charges, urging that the wire transfers did not constitute a violation of R.C. 1153.01 as alleged in the indictment. Prior to sentencing, the state moved to amend the indictment as to the unauthorized acts counts in order to add the language to the effect that Warner "* * * did issue or put into circulation a warrant or other order" without board authorization. The trial court granted the state's motion to amend the indictment and denied Warner's motion for acquittal.

Thus, the difference between the two versions of the indictment is the substantive addition to the post-trial amended indictment that Warner issued or put into circulation "a warrant or other order."

As the court of appeals noted, in four separate instances the written instructions indicated that the proscribed unauthorized acts with which Warner was charged included not only the language "assign[ment], transfer or deliver[y] [of] a note, bond, draft or other written instrument," but also included the language "issu[ance] or * * * circulation [of] a warrant or other order." In comparing the transcripts of the oral jury instructions with the written jury instructions, we find that in both sets of instructions the trial court, with respect to violations of R.C. 1153.01, initially gave a verbatim recitation of the statute in its entirety. Furthermore, in the written instructions the trial court cited the clause "issu[ance] or * * * circulation [of] a warrant or other order" along with the rest of the statute in its introduction to the unauthorized acts counts. However, the specific instructions for each count alleging violations of R.C. 1153.01 required the jury to consider only whether Warner assigned, transferred or delivered a note, bond, draft or other written instrument.

Thus, the written instructions recited the entire statute in various introductory remarks, while the instructions for the actual counts for which Warner was ultimately convicted set forth only the pertinent language of the statute necessary to support criminal liability. Therefore, there were no material differences between the oral and written instructions since both contained the essence of the charge and the specific conduct which was attributable to Warner. In light of the discussion above, we find that the trial court erroneously granted the

post-trial amended indictment, since the state's case and jury instructions (oral and written) were consistent with the original amended indictment. Thus, we conclude that Warner was not prejudiced[23] by the post-trial amendment because his conviction was supported by the original amended indictment.

Accordingly, the state's second proposition of law is sustained, while Warner's seventh proposition of law is overruled.

XII
Restitution

In the state's seventh proposition of law and Warner's fifteenth and sixteenth propositions of law, the issue is whether the trial court properly ordered Warner to remit $22,000,000 in restitution for damages arising from his unauthorized acts and securities violations.

The state suggests that the $22,000,000 could be based on two components: (1) $12,200,000 for the six unauthorized acts of which Warner was convicted, and (2) $10,700,000 for Warner's three securities violations.

As a threshold to this issue we must respond to Warner's assertion that restitution was improper since financial losses are not property damages within the meaning of R.C. 2929.11. Warner was convicted of six unauthorized acts under R.C. 1153.01 and three securities violations under R.C. 1707.44, all fourth degree felonies. R.C. 1153.99 and 1707.99. For a fourth degree felony, R.C. 2929.11 provides in pertinent part:

"(E) * * * the court * * * may require a person who is convicted of or pleads guilty to a felony to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, that the person committed."

"Property," as the term is used in the Revised Code, is defined as "any property, real or personal, tangible or intangible, and any

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[23] Since we have concluded that there were no material deviations between the oral and written jury instructions, any error with respect to Warner's inability to review the written instructions was harmless.

interest or license in such property." R.C. 2901.01(J). And R.C. 2913.01(K) defines a "theft offense" as "* * * (3) [a]n offense under an existing or former municipal ordinance or law of this or any other state or the United States involving robbery, burglary, breaking and entering, theft, embezzlement, wrongful conversion, forgery, counterfeiting, deceit, or fraud; (4) [a] conspiracy or attempt to commit, or complicity in committing any offense under division (K) * * * (3) of this section."

Clearly, the term "property," as used in R.C. 2929.11(E), is sufficiently broad to include financial damages. There is no evidence that the General Assembly intended to restrict the meaning of property damages to physical damage to property. Therefore, we will not graft a narrow interpretation of the term "property" and, consequently, a court may order a defendant to pay restitution for financial damages pursuant to R.C. 2929.11.

Furthermore, the term "theft" includes the commission of unauthorized acts in violation of R.C. 1153.01, since these acts are in essence the wrongful conversion of property. Similarly "theft," as defined in R.C. 2913.01 (K)(3), encompasses securities fraud or acts which are tantamount to fraud, *e.g.*, violations of R.C. 1707.44(B)(4), (G) or (J). Thus, an order to pay restitution for committing unauthorized acts and securities fraud or violations tantamount to fraud is permissible under the Revised Code.

Having established that an order of restitution could be imposed upon Warner for any property damage or loss caused by his criminal acts, our next task is to determine whether the trial court's order was supported by sufficient evidence.

Prior to sentencing, the state and Warner submitted memoranda on the issue of restitution. Also, the trial court conducted a hearing and took evidence. In reviewing the record, which includes the testimony of Gerald Stephens, a former Home State senior vice president, we find that $12,200,000 of the approximate $140,000,000 loss suffered by Home State debenture holders was due to the six unauthorized acts Warner was convicted upon. Specifically, the evidence at trial supported the allegations that Warner transferred $2,500,000 on August 29, 1983, $1,700,000 on August 31, 1983, $2,700,000 on September 15, 1983, $1,800,000 on September 16, 1983, $3,000,000 on October

12, 1983, and $500,000 on October 14, 1983 to ESM without the authorization of Home State's board of directors. There is no evidence in the record to suggest that Home State's debenture holders ever recovered the $12,200,000 that was transferred. Thus, $12,200,000 of the trial court's restitution order was supported by competent, credible evidence and was not against the manifest weight of the evidence.

However, in addition to the $12,200,000 in actual losses, the state alleged that Home State debenture holders lost $10,775,463 from the sales or exchanges during the 1984 debenture offering. The record discloses that Home State sold or exchanged debentures from September through November 1984, which were scheduled to become due October 31, 1989, in the following amounts:

"a. 1989 debentures exchanged for 10/31/84 debentures — $5,875,500

"b. 1989 debentures exchanged for accrued interest on 10/31/84 debentures — $1,471,059

"c. sale of 1989 debentures for cash — $3,428,904

"Total 1989 debentures sold or exchanged — $10,775,463."

The overall losses suffered by depositors of Home State were calculated to be $129,000,000, which was ultimately paid by the Depositor Assistance Corporation, which obtained its funds by borrowing them from the state of Ohio.

The record reflects that at the time of Home State's collapse, it had debenture liabilities in excess of $26,000,000. Although over $10,700,000 was advanced by Home State in exchanges of the old debentures for new debentures in October 1984, there was seemingly no effect upon its existing liabilities. Basically, according to Gerald Stephens, the old debentures relieved Home State of approximately $30,000,000 worth of liabilities, in exchange for which Home State took on approximately another $10,700,000 in liabilities, which left a net effect of a reduction of $18,000,000 of liability. Also, he stated, when Home State collapsed in 1985, $11,000,000 in obligations were still outstanding from the 1984 public offering. Those obligations were subsequently satisfied by the state of Ohio. These statements seemingly are contradictory and unsupportable.

Although the state can account for approximately $10,700,000 in funds which were exchanged as a result of the fall 1984 offering, the record is not clear as to any *direct* losses sustained as a result of the exchanges. Instead, the record suggests that a net reduction in liability took place. The $11,000,000 in outstanding liabilities attributed to the offering at issue is not broken down or traced to the offering circular anywhere in the record. This court is left to guess what losses flowed directly from the offering. We find there was insufficient evidence upon which the trial court could determine actual losses occasioned by the offering. Therefore, since in our view the record supports only $12,200,000 in actual losses, we must modify the trial court's order of restitution from $22,000,000 to $12,200,000[24] and we remand this case to the trial court for further proceedings in order that the parties may be permitted to present evidence upon which losses, if any, from counts eighty-three, eighty-five and eighty-six may be determined.

Accordingly, the state's seventh proposition of law and Warner's fifteenth proposition of law are sustained in part, while Warner's sixteenth proposition of law is overruled.

XIII
Conclusion

For the reasons stated in this opinion and those referred to in *State v. Schiebel, supra*, the judgment of the court of appeals is reversed in case Nos. 89-584 and 90-84, and we reinstate defendant's conviction on even-numbered counts seventy-two through eighty-two for the commission of unauthorized acts and counts eighty-three, eighty-five and eighty-six for violations of the securities laws of Ohio. The order of restitution by the trial court is modified to $12,200,000, and we remand for further proceedings not inconsistent with this opinion.

Judgment reversed
and cause remanded.

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[24] The order of restitution does not foreclose the state from seeking additional remedies against Warner for losses suffered by Home State and its depositors.

MOYER, C.J., J. V. CORRIGAN, NAHRA, WRIGHT, H. BROWN and MCCORMAC, JJ., concur.

JOHN V. CORRIGAN, J., of the Eighth Appellate District, sitting for SWEENEY, J.

JOSEPH J. NAHRA, J., of the Eighth Appellate District, sitting for DOUGLAS, J.

JOHN W. MCCORMAC, J., of the Tenth Appellate District, sitting for RESNICK, J.

APPENDIX B

55 Ohio St. 3d 71, 564 N.E. 2d 54

The State of Ohio, Appellant and Cross-Appellee, v. Schiebel, Appellee and Cross-Appellant.

The Supreme Court of the State of Ohio
Nos. 89-583 and 90-85

October 26, 1990

1. A motion for new trial pursuant to Crim. R. 33(B) is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion.

2. Where an attorney is told by a juror about another juror's possible misconduct, the attorney's testimony is incompetent and may not be received for the purpose of impeaching the verdict or for laying a foundation of evidence *aliunde*.

3. Where a trial court receives and evaluates conflicting evidence regarding the state of the record, the decision to correct or supplement the record pursuant to App. R. 9(E) rests upon the court's ability to weigh the evidence. Where it is supported by competent, reliable evidence, such ruling will not be reversed by a reviewing court.

(Nos. 89-583 and 90-85–Submitted June 6, 1990–
Decided October 26, 1990.)

APPEALS and CROSS-APPEAL from the Court of Appeals for Hamilton County, Nos. C-880102 and C-870236.

David J. Schiebel, defendant-appellee and cross-appellant,[1] was convicted on March 2, 1987 in the Hamilton County Court of Common Pleas on three counts of securities fraud in violation of R.C. 1707.44 (B)(4), 1707.44(G), and former 1708.5 as now codified in R.C. 1707.44(J). Of the eighty-eight total counts in the amended indictment, counts eighty-four and eighty-eight were dismissed by the trial court, Schiebel was found guilty of counts eighty-three, eighty-five and eighty-six, and he was found not guilty on all other counts.[2] The facts relevant to defendant's conviction and this appeal are as follows.

Prior to trial, Schiebel moved to have the indictment against him dismissed, asserting that the emergency legislation, Am. S.B. No. 147, that provided for the appointment of a special prosecutor was constitutionally invalid because it constituted legislative encroachment upon an inherently executive function. He argued that this violated the separation of powers doctrine. Schiebel also moved for a separate trial, for a change of venue, and for a severing of the securities charges in counts eighty-three to eighty-seven from the banking charges in counts one through eighty-two. The trial court overruled all motions.

Defendant also moved for automatic exclusion of any potential juror who had been a depositor of Home State Savings Bank ("Home

[1] Together with Marvin L. Warner and Burton Bongard, defendant was indicted and tried in connection with the financial collapse of the Home State Savings Bank. Reference to Schiebel's codefendants throughout this opinion is necessary in understanding and resolving the issues on appeal here. For a history of the transactions leading to the indictment, see the companion case *State v. Warner* (1990), 55 Ohio St. 3d 31, ___ N.E. 2d ___.

[2] As amended, the indictment charged Schiebel with forty-two counts of misapplication of funds (odd numbered counts one to eighty-one and eighty-eight) and forty-one counts of unauthorized acts (even numbered counts two to eighty-two) in violation of R.C. 1153.01. In five counts, eighty-three to eighty-seven, he was charged with violations of securities law pursuant to R.C. 1707.44(B)(4),(D),(F),(G), and 1708.05. Count eighty-eight was related to the merger of Home State with its parent company.

State") between May 1983 and June 1985, or who was related up to the fifth degree of consanguinity with any person who was a depositor in Home State. In addition, defendant requested that persons who either had deposits or were related to persons with deposits in other institutions insured by the Ohio Deposit Guarantee Fund ("ODGF") be excluded from the jury panel. The trial court agreed that any depositor or debenture holder of Home State would be excused for cause from the jury, as such persons would be considered victims of Home State collapse. The court overruled the defendant's request to exclude for cause depositors of other ODGF-insured institutions, finding that they were not victims of the Home State collapse.

Voir dire began on Monday, November 17, 1986. Seventy prospective jurors were interviewed in lengthy and thorough examinations by the trial court, attorneys for the state or attorneys for each defendant.

Opening statements were made on December 9, 1986, and the trial concluded on February 20, 1987. The jury retired to deliberate late on Friday afternoon, February 20, and, after deliberating for nine days, returned guilty verdicts on the counts referred to on March 2, 1987. Defendant was sentenced on March 30, 1987 to a definite term of imprisonment of one and one-half years on each of the three counts, to be served concurrently. One year of the sentence was suspended and defendant was placed on five years' probation upon completion of six months' incarceration. Defendant was ordered to pay $25,000 in costs.

On March 16, 1987, defendant filed a timely motion for a new trial, arguing the same grounds as those argued in the motion for new trial filed by Marvin Warner on the same date. The motion raised a renewal of the argument for a change of venue, and claims that the jurors had been given written charges that defendants had not been permitted to examine, and that the written instructions modified instructions the trial court had given orally. Defendant made no allegation of newly discovered evidence or juror misconduct as a basis for this motion for new trial.

On April 20, 1987, Warner moved for leave to file a second motion for new trial outside the fourteen-day limit provided in Crim. R. 33(B), and filed a motion for new trial based on "newly discovered"

evidence relating to the misconduct of a juror. The motions were predicated on Crim. R. 33(A)(1), (2) and (6). Schiebel filed motions based on the same grounds. The trial court overruled both defendants' motions for leave to file motion for new trial and for new trial based on juror misconduct.

Schiebel and Warner each filed two appeals in the First District Court of Appeals. Among the matters raised in the appeal on the merits, Schiebel and Warner contended that four supplemental jury instructions given orally to the jury on Friday afternoon, February 20, 1987, were not given to the jury in writing. As a result, the state moved the trial court for certification of a supplemental record pursuant to App. R. 9(E), so that the supplemental written jury instructions could be added to the record on appeal. The trial court received memoranda, affidavits and argument of counsel from both defendants, and granted the state's motion to correct the record to state that the supplemental written jury instructions had been delivered.

The other appeals, our case Nos. 89-583 and 89-584, challenged the trial court's denial of motions for leave to file motion for new trial and for new trial based on juror misconduct.

In separate opinions, the court of appeals reversed Schiebel's conviction, our case No. 90-85, and reversed the trial court's denial of his motion for leave to file motion for new trial, our case No. 89-583. The state appealed from both judgments and defendant cross-appealed on issues on which the court ruled against him in the court of appeals in our case No. 90-85.

These causes are now before this court upon the allowance of motions and cross-motion for leave to appeal.

Lawrence A. Kane, Jr., special prosecutor, *Mark A. Vander Laan, Carl J. Stich, Jr., Kenneth S. Resnick, Paul R. Mattingly* and *M. Gabrielle Hils*, for appellant and cross-appellee.

Coolidge, Wall, Womsley & Lombard Co., L.P.A., Roger J. Makley and *Janice M. Paulus*, for appellee and cross-appellant.

MOYER, C.J. Because defendants were tried together, many of the issues presented on appeal by the state and on cross-appeal by the defendants are intertwined. To avoid duplication, we therefore resolve

issues common to both defendants in either the instant case or *State v. Warner* (1990), 55 Ohio St. 3d 31,__ N.E. 2d __.

89-583
The Motion for New Trial

Immediately after the verdict was rendered on March 2, 1987, and before sentencing on March 30, some of Marvin Warner's attorneys began interviewing jurors in anticipation of litigation in federal court. Attorneys Josephine P. Warner, William H. Jeffress. Jr., and R. Stan Mortenson interviewed jurors Herman Cooper, John Brady, Rita Lafkas, Elmer Mathas, Helen Moore and Albert Stuck. During the first interviews it appears none of the jurors made any statements tending to impeach the verdict, nor did counsel inquire about possible misconduct.

However, on April 9, 1987, juror Lafkas signed an affidavit averring that juror Larry Dalton told her that Dalton's mother-in-law had a deposit in Home State, and that Dalton had stated that he "hated" Marvin Warner.

On April 20 and 23, 1987, forty-nine and fifty-two days after the jury verdict, Warner and Schiebel, respectively, moved for leave to file a motion for new trial based on Dalton's alleged "misconduct." In his motion, Schiebel argued that the alleged juror misconduct qualified as newly discovered evidence within the meaning of Crim. R. 33(B). In response, the state moved to strike the juror affidavits as incompetent under Evid. R. 606(B), and because the motions were untimely filed.

On January 14, 1988, the trial court conducted a hearing in *State v. Warner*, in which jurors Brady and Lafkas and attorneys Mortenson, Warner and Jeffress testified. At Schiebel's request, his motion was decided on the basis of the hearing on Warner's motion. Juror Brady testified that he had not been asked about juror misconduct when interviewed by the attorneys immediately after trial. Attorney Mortenson testified that he informed attorney Josephine Warner that there should be a follow-up interview of juror Brady, but Josephine Warner did not contact Brady until March 28, two days before sentencing–

more than twenty-five days after the verdict. The trial court overruled both defendants' motions for leave to file motion for new trial.

The court of appeals reversed the trial court's denial of the motions for leave to file motion for new trial, holding that Warner and Schiebel had shown by clear and convincing evidence that they were unavoidably prevented from timely filing their motions for new trial.

Crim.R. 33(B) provides that a motion for new trial, other than upon the ground of newly discovered evidence, must be filed within fourteen days after the verdict was rendered "* * * unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial * * *." The court of appeals stated that a motion for new trial based on juror misconduct is different from one based on newly discovered evidence.

Warner's and Schiebel's motions for new trial relating to juror misconduct raise two issues for consideration. The first is whether defendants showed by clear and convincing evidence that they were unavoidably prevented from discovering the juror misconduct.

The standard of "clear and convincing evidence" is defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O 361, 120 N.E. 2d 118, paragraph three of the syllabus; *In re Adoption of Holcomb* (1985), 18 Ohio St 3d 361,368,18 OBR 419,425,481 N.E. 2d 613,620.

Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof. *Ford v. Osborne* (1887),45 Ohio St. 1, 12 N.E. 526, paragraph two of the syllabus. However, it is also firmly established that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court. An appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court judge. *See Seasons Coal Co. v. Cleveland*

(1984), 10 Ohio St. 3d 77, 80, 10 OBR 408, 411, 461 N.E. 2d 1273, 1276; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St. 2d 279, 8 O.O. 3d 261, 376 N.E. 2d 578.

Warner's attorneys interviewed several jurors immediately after the verdict was rendered, but, it appears, failed to inquire as to possible misconduct. Although Warner's attorneys sought to gain the jurors' impressions of the case, they did not question jurors about other jurors' conduct or the deliberations. It cannot be said with any degree of probability, let alone conclusively, that Warner was unavoidably prevented from discovering any alleged misconduct before the fourteen-day period elapsed since none of his attorneys asked about juror misconduct, outside influence, tampering or other improper conduct which could have been identified and proved by means of outside sources. Until juror Lafkas volunteered a statement to attorney Warner about juror Dalton, defendants had made no attempt to ascertain any misconduct. Juror Brady stated that he was prepared to mention the matter to Warner's attorneys, but did not because he was not questioned on the matter.

If such is the case with Warner, Schiebel has the more difficult case in showing by clear and convincing evidence that he was unavoidably prevented from discovering any juror misconduct. Schiebel's attorney made no attempt to interview the jurors. His motions for leave to file motion for new trail and for new trial based on juror misconduct were filed after Warner filed his motions, and were based purely on the efforts of Warner's attorneys, not his own. It cannot be said that Schiebel was unavoidably prevented from discovering an incident of juror misconduct when he made no attempt toward such discovery.

The second, and more fundamental issue, stems from the rule on evidence *aliunde* recognized in Ohio. Evid. R. 606(B) governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict. The first sentence of Evid. R. 606(B) embodies the common-law tradition of protecting and preserving the integrity of jury deliberations by declaring jurors generally incompetent to testify as to any matter directly pertinent to, and purely internal to, the emotional or mental processes of the jury's deliberations. The rule is designed to protect the finality of verdicts and to ensure that jurors are

insulated from harassment by defeated parties. *See State v. Adams* (1943), 141 Ohio St. 423, 25 O.O 570, 48 N.E. 2d 861.

In order to permit juror testimony to impeach the verdict, a foundation of extraneous, independent evidence must first be established. This foundation must consist of information from sources other than the jurors themselves, *Wicker v.Cleveland* (1948), 150 Ohio St. 434, 38 O.O. 299, 83 N.E. 2d 56, and the information must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence *aliunde* being introduced first. *See Diehl v. Wilmot Castle Co.* (1971), 26 Ohio St. 2d 249, 55 O.O. 2d 484, 271 N.E. 2d 261; *Lund v. Kline* (1938), 133 Ohio St. 317, 10 O.O 411, 13 N.E. 2d 575; *Kent v. State* (1884), 42 Ohio St. 426, paragraph four of the syllabus. Similarly, where an attorney is told by a juror about another juror's possible misconduct, the attorney's testimony is incompetent and may not be received for the purposes of impeaching the verdict or for laying a foundation of evidence *aliunde*. *See Tasin v. SIFCO Industries, Inc.* (1990), 50 Ohio St. 3d 102,553 N.E. 2d 257; *Dodd v. McCammon* (1920), 14 Ohio App. 160, 32 Ohio C.C.(N.S.) 68.

The evidence of juror misconduct in this case is derived strictly from juror affidavits. During pretrial voir dire, Larry Dalton stated that he did not know anyone with deposits at Home State. After trial, and before the January 1988 hearing, Dalton executed an affidavit in which he admitted that sometime during the trial his mother-in-law had briefly mentioned that she had had money in Home State in the past, but did not have any money there at the time of the collapse. He stated that at no time during his service as juror had he known when she had money in Home State, or the amount. He stated that he had made statements to jurors Lafkas and Brady. However, he averred that his mother-in-law's statements had had no effect on his duties as a juror, and that he had had an open mind at all times, had been fair and impartial, and had considered only the evidence presented by the parties. Dalton stated that he had enjoyed "needling and kidding" Rita Lafkas and had said that he "hated" Marvin Warner in order to get a "rise out of her," but that this had had nothing to do with his deliberations.

Upon later investigation, it was learned that Dalton's mother-in-law, Sara B. Horton, had opened an account at Home State in February 1984. She had an active checking account until she withdrew a balance of $52.28 in December 1984, several months before Home State collapsed. Because it was an interest-bearing account, there remained twenty cents in accrued interest which was finally withdrawn to close her accounts on August 22, 1985, approximately three months after Home State collapsed. Mrs. Horton did not lose her money, and there was no indication that she was "injured" by the collapse or felt any animosity toward Home State or the defendants.

This was the evidence before the trial court when it denied the motions for leave to file motion for new trial. First, the motions were clearly filed outside the fourteen-day requirement of Crim. R. 33(B). The term "newly discovered evidence," as used in that rule, does not refer to evidence of juror misconduct. Second, based on the evidentiary hearing, the court found that the parties had not shown by clear and convincing evidence that they had been "unavoidably prevented" from discovering the alleged juror misconduct. See Crim. R.33(B). Third, the evidence presented by the defendants was by affidavit of jurors which was internal to their deliberations, would have impeached the verdict, and yet was not supported by extrinsic, independent evidence by outside sources. This was a violation of the *aliunde* rule incorporated in Evid. R. 606(B).

Confronted with these facts, the trial court, even had it granted leave to file a late motion, could have reasonably determined that the alleged juror misconduct did not result in bias and prejudice to the defendants, and did not necessitate a new trial. Motions for new trial pursuant to Crim. R. 33(B) are addressed to the sound discretion of the trial court, see *State v. Williams* (1975),43 Ohio St. 2d 88, 72 O.O. 2d 49, 330 N.E. 2d 891, and will not be disturbed on appeal absent an abuse of discretion. See, generally, *State, ex. rel. Crosby, v. Ohio Dept. of Mental Retardation & Developmental Disabilities* (1988), 38 Ohio St. 3d 179, 527 N.E. 2d 812.

The court of appeals erred in substituting its judgment for that of the trial court. The judgment of the court of appeals is reversed.

90-85

The Appeal on the Merits

We will first address the state's appeal, then consider defendant's cross-appeal.

I

Juror Disqualification

The issue raised in the state's and Schiebel's first propositions of law is whether every potential juror should have been disqualified who had an account in any savings and loan institution that was temporarily closed by the Governor after the collapse of Home State.

The trial court excluded prospective jurors who themselves had or whose relatives had deposits in Home State when it was closed.

However, the trial court ruled that persons who had an account in a savings and loan institution that was temporarily closed by the Governor as a result of the Home State collapse were not victims of the collapse in the same way that Home State depositors were and that they could serve as jurors. As a result, defendant claims he was prejudicially forced to use peremptory challenges to excuse such jurors.

Juror Beth H. Statt had deposits at Mt. Healthy Savings & Loan and was challenged for cause by defendants Warner and Schiebel. The defendants had exhausted their peremptory challenges by then and Statt became the twelfth juror. Of the prospective jurors that Schiebel challenged on this ground, only Statt became a juror.[3]

During voir dire, Statt said that she had approximately $2,000 deposited with Mt. Healthy Saving & Loan when Governor Celeste ordered all state-charted savings and loan institutions temporarily

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[3] A number of prospective jurors were challenged for cause on the basis of the Governor's order temporarily closing savings and loan institutions as a result of the Home State collapse. However, defendants Warner and Schiebel were forced to peremptorily exclude only one of those jurors, prospective juror Iles, who was excluded by Warner. A review of Iles' voir dire reveals that, like juror Statt, he suffered little if any harm from the Governor's order. Therefore, since we find that the denial of the challenge for cause was not error regarding Statt, it was likewise not error regarding prospective juror Iles.

closed to prevent the public from withdrawing all funds on deposit. Statt was unable to withdraw her funds for three or four weeks. During that time, some checks issued to her creditors were returned unpaid. As a result of the closure, she cashed her paychecks at a bank close to her home.

During questioning she was asked the following:

"Q: Do you feel, as a result of that, you have any preconceived notions about the guilt or innocence of these defendants?

"A: No. The way I look at it is Celeste was trying to do something to prevent all the savings and loans from having repercussions, so, by my not being able to get to any money for that time it did not create personal hardship. I still had my paychecks that I would take to another bank, so I was not personally affected.

"Q: So you don't feel any animosity or feel any preconceived notions of the guilt or innocence of these defendants because of anything that happened to you as a result of the Home State collapse?

"A: I feel it was unfortunate, but, you know, these kind of things happen sometimes.

"Q: * * * is there anything you want to tell us that you know of that would keep you from being a fair and impartial juror in this case.?

"A: I don't think so."

Statt said that most of the places where she did business did not penalize her for returned checks, nor did her bank charge for the returned checks. In response to further questioning, she responded that she did not feel victimized by the Home State collapse, that she had no preconceived notions as to the guilt of the three defendants, and that she could be a fair and impartial juror and judge defendants according to the law as the court would instruct her.

"[Warner's counsel]: If you were firmly convinced, in your own mind, or if you felt that the prosecution had failed to prove beyond a reasonable doubt any one of those 88 counts, you would not yield your judgment on that simply for the sake of compromise, would you?

"A: No, I don't think it's right that somebody is punished if they are not guilty."

The court of appeals sustained defendants' assignments of error on this point, holding that notwithstanding Statt's protestations of impartiality, she had suffered a direct and immediate economic deprivation which she perceived to be attributable to the collapse of Home State.

This proposition of law presents the question of whether juror Statt should have been excluded for cause pursuant to Crim. R. 24(B)(11) as a "person alleged to be injured or attempted to be injured by the offense charged * * *." Schiebel contends that Statt was "injured" by the collapse of Home State because of the Governor's resulting order freezing her savings and loan account. The state, however, contends that Statt was not "injured" and in any event was not subject to automatic disqualification given her clear lack of bias.

A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is manifestly arbitrary and unsupported by substantial testimony so as to constitute an abuse of discretion. See *State v. Wilson* (1972), 29 Ohio St. 2d 203, 211, 58 O.O. 2d 409, 414, 280 N.E. 2d 915, 920-921.

The trial court in our view correctly rejected the defendants' overbroad contention that all depositors whose accounts were frozen were "injured." The hardship resulting to depositors could only be determined by assessing their individual circumstances. No *per se* rule could be applied in this case.

In assessing juror Statt's circumstances, we find that she suffered little if any harm from the collapse of Home State. She said she "had no need to get out a large amount of money." Although some of her checks were not honored because her account was frozen, Statt said that she was for the most part not penalized. Statt did not indicate the extent to which she was penalized for any dishonored checks. Finally, as indicated above, Statt said, "I still had my paychecks that I would take to another bank, so I was not personally affected." "Injury" connotes something more than mere inconvenience or concern. We find under these circumstances that the trial court did not abuse its discretion in refusing to excuse juror Statt for cause under Crim. R. 24(B)(11). We therefore reverse the court of appeals on this issue.

II
Issues Relating to Jury Instructions

The state's second, third and fourth propositions of law and Schiebel's second, third, fourth and ninth propositions of law are based on the following facts.

The trial court instructed the jury in open court on Friday afternoon, February 20, 1987. Defendants' request for a copy of written jury charges had been denied. Before sending the jury to begin deliberations, the trial court held a conference in chambers to hear objections or requests from counsel. Schiebel joined Warner in requesting an instruction on the "duty to disclose" in connection with the securities counts and an instruction on the "good faith" defense. Bongard requested an instruction on the power of savings and loans to invest under R.C. 1151.34, and the prosecution requested an instruction on motive in connection with the charges of unauthorized acts.

The trial court orally gave the jury these four supplemental instructions. The jury then retired to begin deliberations, and was given the court's written instructions in a black loose-leaf binder. The jury returned Saturday morning (February 21, 1987) to continue its deliberations. These events are not disputed by the parties.

However, events of Saturday morning gave rise to the prosecution's motion to correct the record filed in April 1989. Both parties submitted affidavits and memoranda in an attempt to recreate those events. From these affidavits and the transcript of the proceedings, we ascertain the following.

Warner's attorneys, Jeffress and Miller, met with assistant special prosecutor Elleman in the trial judge's chambers to determine the status of the jury instructions. Neither Schiebel nor his attorneys were present. After discussion and agreement, Miller gave Brenda Sellmeyer, one of the court reporters, three or four typed pages represented as being the supplemental instructions given orally to the jury on Friday afternoon. She retyped the pages as instructed. Those instructions were given to the trial judge, who instructed Constable Donnellon to give them to the jury. Donnellon averred that he went to the jury room with approximately three or four typed pages of instructions. The jury was assembled but on break. Donnellon averred that

he "stated to the jurors as a group that there were some additional jury instructions for them to consider along with ones which were in the binder which had been given to them the afternoon before." He averred that he then placed the instructions on the table and left the room.

After the jury delivered its verdicts on March 2, 1987, Sellmeyer and two other members of the court staff entered the jury room to gather the exhibits. According to Sellmeyer's affidavit, the room was chaotic as members of the press were already there "fishing through boxes and waste paper baskets." Court staff placed the exhibits on a cart, but on the way to the clerk's office the cart tipped over when it caught on a television camera cord.

After sentencing on March 30, Warner's attorneys obtained copies of the jury instructions from the binder, and evidently shared them with Schiebel's attorneys. The four supplemental instructions were not in the binder.

The absence of these written supplemental jury instructions from the original appellate record was the premise for assignments of error in the court of appeals by defendants.

The state then filed motions to correct the record in the trial court requesting that the four supplemental instructions be added to the appellate record. The defense presented affidavits from two jurors, each attesting that he did not remember Donnellon bringing additional jury instructions into the room, and stating that he did not consider any instructions outside those contained in the binder. Jeffress filed an affidavit averring that he had spoken with three other jurors who also had no recollection of additional jury instructions.

Elleman filed an affidavit stating that on review of his papers from the trial, he found "copies of several typed instructions[,] the originals of which * * * [he] believe[d] were among those delivered to the jury" on Saturday morning. One concerned the good faith defense, one concerned motive, and the third concerned the power of saving and loan associations to invest funds. Sellmeyer, the court reporter, averred that these three instructions looked like ones she had typed on Saturday morning. However, she stated that these supplemental instructions, which had been stored on computer disk, had since been erased, and no one claims to have seen them thereafter, except the copies that Elleman averred that he had found. The instruc-

tion regarding the duty to disclose was not among those found by Elleman.

The state's motions to correct the record were considered separately as to each defendant. On May 26, 1989, Judge Ruehlman granted the motion to correct the record in the Warner case, based on the "memoranda, affidavits and argument of counsel." Judge Niehaus, the original trial judge, conducted a hearing on June 15, 1989 to consider the state's motion in the Schiebel case. During the hearing, Judge Niehaus stated that he had been under the impression that Jeffress and Miller had been representing all defendants on that Saturday morning, that he had understood Donnellon would place the additional instructions in the binder, and that these instructions should be part of the record. The trial court granted the motion to correct the record. Its orders stated that "the jury instructions presented orally by the trial court after the chambers conference on February 20,1987 * * * [the Friday afternoon] were delivered in writing to the jury the following day."

On June 13 and 19, 1989, the court of appeals granted defendants' motions to file two supplemental assignments of error challenging the trial court's order correcting and certifying the additional record.

Among the matters raised, both defendants contended that the variations between the written charge in the binder and the oral charge were prejudicial in that the written charge did not include instructions presented orally on the good faith defense and the duty to disclose, which they asserted were critical to their defense on the counts of the indictment charging securities law violations.

Defendants also complained that the trial court erred in refusing to provide them with copies of the written jury instructions, and that the constable's *ex parte* communications in delivering the supplemental instructions violated their right to a fair trial. Schiebel contended that his absence on Saturday morning when the jury was given the supplemental instructions deprived him of his constitutional right to be present during all proceedings.

In considering defendants' appeal on the merits that there were variations between the oral and written instructions along with the supplemental assignments of error, the court of appeals held: (1) that

the trial court abused its discretion in granting the state's motion to correct the record to include instructions on motive, power to invest and good faith without conducting an evidentiary hearing (treated in Part II[A], *infra);* (2) that affidavits of jurors were admissible for determining the motion to correct the record (discussed in Part II[B], *infra);* (3) that the defense raised a presumption of prejudice that the constable's *ex parte* communication with the jury when he delivered the instructions was prejudicial, which was not rebutted by the state (discussed in Part II[C], *infra*); (4) that Warner and Schiebel were prejudiced by the absence from the written charge of the instruction on the duty to disclose (treated in Part II[D], *infra*); (5) that the trial court did not err in refusing to provide defendants with copies of the written jury instructions prior to submission of the case to the jury (treated in Part II[E], *infra*); and (6) that delivery of the supplemental written instructions to the jury without the presence of Schiebel or his counsel violated Schiebel's right to be present at every stage of the proceedings pursuant to Crim. R. 43(A) (treated in Part IV, *infra*). The court stated, however, that a comparison of the oral charges on motive, power to invest and good faith did not vary materially from the written versions provided by Elleman in his affidavit. We will dispose of each holding separately.

A
Correction of the Record

App. R. 9(E) provides the conditions under which a trial court record may be corrected: "If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals."

Two things are clear from the rule. The first is that either the trial court or the court of appeals may order that a record be corrected and supplemented. The second is that where a party seeks to have the record corrected, it is within the province of the trial court to resolve disputes about the record on appeal.

A trial court's authority under App. R. 9 in resolving disputes about the record is well stated in *Joiner v. Illuminating Co.* (1978), 55 Ohio App. 2d 187,195-196, 9 O.O. 3d 340, 345, 380 N.E. 2d 361, 366:

"Appellate Rules 9(C),(D), and (E) clearly state that if there are any objections, proposed amendments, or disagreements as to the proper contents of the statement of evidence or proceedings, of an agreed statement, or of the record as usually constituted under App. R 9(A), these differences shall be submitted to and settled by the court.
* * *

"The terms 'approval' and 'conforms to the truth' as employed by Appellate Rules 9(C), (D), and (E), mean that the trial court must first determine the accuracy and truthfulness of a proposed statement of the evidence or proceedings or an agreed statement and then approve it and sign it. This gives the trial judge the responsibility, duty, and authority to delete, add, or otherwise modify portions of a proposed statement so that it will conform to the truth and be accurate before he approves it."

A court of appeals can authorize correction or supplementation of the trial court's record when the accuracy of proposed changes is undisputed, *In re Estate of Reeck* (1986), 21 Ohio St. 3d 126, 21 OBR 429, 488 N.E. 2d 195, but the court of appeals cannot resolve disputes about the trial court's record in the course of an appeal. *Associated Estates Corp v. Fellows* (1983), 11 Ohio App. 3d 112, 114, 11 OBR 166, 168, 463 N.E. 2d 417, 420.

Here, the court of appeals found a conflict in the evidence presented by the parties on the motion to correct the record. Such a conflict is for the trial court to resolve in its sound discretion. Where a trial court receives and evaluates conflicting evidence regarding the state of the record, the decision to correct or supplement the record pursuant to App. R. 9(E) rests upon the court's ability to weigh the evidence. Where it is supported by competent, reliable evidence, such ruling will not be reversed by a reviewing court absent an abuse of

discretion. See *State v. Adams* (1980), 62 Ohio St. 2d 151, 16 O.O. 3d 169, 404 N.E. 2d 144.

Here the prosecution presented affidavits from court personnel to the effect that three or four supplemental instructions given orally on Friday afternoon were typed and delivered to the jury on Saturday morning. The defense presented affidavits from two jurors to the effect that they did not remember receiving additional instructions on Saturday morning, nor did they consider supplemental written instructions in their deliberations.

The issue here is not whether the jurors considered the supplemental instructions during their deliberations in reaching a verdict, but whether there was sufficient evidence presented to support the trial court's decision that those instructions were delivered. We believe there is.

Two of Warner's attorneys were present on Saturday morning with one assistant special prosecutor and the trial judge. The record indicates that they went there specifically for the purpose of causing the additional instructions to be reduced to writing and delivered to the jury. In granting the state's motion to correct the record, the trial judges considered all the affidavits, memoranda and arguments of counsel. The trial judge who conducted the trial also conducted the hearing on the state's motion to correct the record in defendant Schiebel's case. There is nothing in the affidavits to directly contradict that the judge handed the instruction to the constable, who, in turn, placed them on the table in the jury deliberation room.

The court of appeals' opinion is somewhat confusing on these issues. In one instance, it concludes that the defendant was prejudiced when the constable delivered supplemental instructions to the jury; in another instance, the court held that there was no substantial difference between the oral and written version of three of the four addjtional instructions; and, in yet another instance, held that it was an abuse of discretion for the trial court to correct the record as to these instructions without an evidentiary hearing. The trial court had sufficient information before it to consider the state's motion. Even assuming a hearing is required by rule or statute, which it is not, it is difficult to imagine what additional "evidence" the court of appeals would have the trial court receive other than that presented as a result of the state's motion.

A fundamental tenet of judicial review in Ohio is that cases should be decided on their merits. App. R. 9(E) is to be construed liberally to give effect to this principle. *In re Estate of Reeck, supra,* at 127, 21 OBR at 430, 488 N.E. 2d at 196; *Reichert v. Ingersoll* (1985), 18 Ohio St. 3d 220, 222, 18 OBR 281, 282-283, 480 N.E. 2d 802, 804-805. Cf. *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St. 2d 189, 192, 23 O.O. 3d 210, 212, 431 N.E. 2d 644, 646. We therefore reverse the court of appeals and uphold the trial court's order correcting the record. We will consider this appeal, therefore, on the assumption that all four disputed supplemental instructions were reduced to writing and given to the jury.

B
Juror Affidavits

In reaching its conclusion that the trial court erred in correcting the record, the court of appeals held that the juror affidavits regarding the supplemental instructions and communication by the court constable were admissible. The admissibility of the juror affidavits presents a problem similar to the one regarding other affidavits offered by the defense in support of its motions for a new trial based on juror misconduct. See the discussion above for case No. 89-583. We have already stated that Evid . R. 606 (B) precludes a juror from testifying as to any matter occurring during the course of deliberations or as to the effect of anything upon his or any other juror's mind "or concerning his mental processes in connection therewith." In *Long v. Cassiero* (1922), 105 Ohio St. 123, 136 N.E. 888, paragraph one of the syllabus, this court held that a juror cannot impeach his signed verdict by an affidavit that the verdict was rendered through a misunderstanding of the charge. Affidavits of jurors, stating that they misunderstood the charge of the court, will not be received on motion to set aside the verdict. "'If a juror's affidavit, stating his idea of the law as the judge had expounded it, or the facts as he understood the witnesses, were to be held sufficient to set aside a verdict, provided it should turn out that he was mistaken in any particular, scarcely any verdict could stand [,]'" *id.* at 127, 136 N.E. at 889, and "[i]f the erroneous verdict was brought about by the charge of the court, error should be predicated, not upon affidavits that the jury misunderstood the charge, but upon

the ground that the charge was so misleading and prejudicial as to induce the erroneous verdict." *Id.* at 128, 136 N.E. at 889; *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.* (1985), 18 Ohio St. 3d 268, 274, 18 OBR 322, 327, 480 N.E. 2d 794, 800. That error exists in the instructions is, of course, part of defendants' argument, and we will address it separately.

Defendants argue that the two juror affidavits should be admissible to decide whether to supplement the record since a portion of their argument is that the four supplemental instructions were essential to the defense of the case, and therefore the jury's failure to "receive" or "consider" the instructions was prejudicial. Nevertheless, any error in these instructions must be established on their content, not on whether the jurors considered them during deliberations. To this extent the affidavits would be inadmissable.

We also observe that the affidavit submitted by Warner's attorney regarding his conversations with other members of the jury is hearsay under Evid. R. 801(C), and is inadmissable under Evid. R. 802. *Tasin v. SIFCO Industries, Inc., supra*, at 107, 553 N.E. 2d at 262.

However, those same jurors' affidavits were admissible in support of an allegation that improper *ex parte* communication occurred between a member of the court staff and the jury. *Emmert v. State* (1933), 127 Ohio St. 235, 187 N.E. 862, syllabus; *State v. Adams, supra,* paragraph one of the syllabus . These cases balance the public policy of the *aliunde* rule and the requirements of R.C. 2945.33 (then G.C. 13448-1) which provides that an officer charged with the care of a deliberating jury "shall not permit a communication to be made to them, nor make any himself * * *." Such a communication is precluded by statute and falls within an exception to the *aliunde* rule incorporated in Evid. R. 606(B), that "* * * [a] juror may testify without the presentation of any outside evidence concerning * * * any improprieties of any officer of the court. * * *"

The court of appeals erred to the extent it ruled that the juror affidavits were admissible in determining whether the trial court abused its discretion in correcting the record. We hold that the court of appeals erred in holding that the record should not have been corrected.

C
Ex Parte Communication by Constable

We next consider the court of appeals' conclusion that the defendant is presumed to be prejudiced by the constable's communication with jurors when he delivered the additional instructions to them.

As a general rule, any communication with the jury outside the presence of the defendant or parties to a case by either the judge or court personnel is error which may warrant the ordering of a new trial. *Rushen v. Spain* (1983), 464 U.S. 114; *Remmer v. United States* (1954), 347 U.S. 227; *Bostic v. Connor* (1988), 37 Ohio St. 3d 144, 149, 524 N.E. 2d 881, 886; *State v. Abrams* (1974), 39 Ohio St. 2d 53, 68 O.O. 2d 30, 313 N.E. 2d 823. Such private communication outside the presence of the defendant does not, however, create a conclusive presumption of prejudice. *Remmer v. United States, supra,* at 229; *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 236-237, 15 OBR 311, 373-374, 473 N.E. 2d 264, 324-325. The communication must have been of a substantive nature and in some way prejudicial to the party complaining. In this case, the constable averred that he entered the jury room and stated "that there were some additional jury instructions for them to consider along with the ones in the binder which had been given to them the afternoon before." He averred that he placed the instructions on the table and left.

This is not the proper method for delivering supplemental instructions to a jury. However, the determinative question is whether the constable's conduct prejudiced the jurors against the defendant. It is apparent from the affidavits filed by defendant to prove that the instructions never were delivered that some of the members of the jury did not recall any communication by the constable regarding additional instructions. We note that Warner's attorneys, who were present, apparently saw no prejudice in allowing the supplemental written instructions to be delivered in this manner, as there is no indication that they objected to the procedure. We perceive no prejudice to Schiebel in the constable's delivery of the instructions to the jury with the comment that they were to consider them along with the other written instructions. If prejudice is to be found, it must be found in the

instructions themselves, not in the constable's comments, which were innocuous.

We conclude that the constable's communication with the jury, although improper, was not prejudicial to the defendant, and was harmless beyond a reasonable doubt.

D
Jury Instruction on the Duty to Disclose

In the state's third proposition of law, and Schiebel's third proposition of law, the issue presented is whether defendant, as charged in this indictment, was entitled to a jury instruction on the duty to disclose. The court of appeals reversed defendant's convictions on counts eighty-three, eighty-five and eighty-six for violation of securities laws pursuant to R.C. 1707.44 (B)(4), 1707.44(J) and 1707.44(G), partly on the basis that the trial court's failure to instruct the jury concerning the duty to disclose constituted reversible error.

We addressed this same issue in *State v. Warner, supra*, at Part IV. For the reasons stated therein, we hold that giving this instruction was erroneous under the circumstances of this case, and that any alleged failure to reduce the instruction to writing would therefore have been harmless to defendants. We therefore reverse the court of appeals.

E
Failure to Provide Counsel with Written Instructions

Although this issue is presented in the cross-appeal, we address it here in the interest of clarity. In his ninth proposition of law, Schiebel states: "When the trial court provides a written charge to the jury in a criminal case, denial of the defendant's request to inspect the written charge before the jury retires constitutes reversible error and violates the defendant's federal and state constitutional rights to a fair trial, right to be present and right to counsel." Codefendant Warner asserts a similar principle in his ninth proposition of law.

In rejecting these claims, the court of appeals relied on *State v. Gerhardt* (1961), 115 Ohio App. 83, 184 N.E. 2d 516. The *Gerhardt* court stated that "[t]he purpose of Section 2945.10(G) is to provide

for a written charge to be presented to the jury for their use in arriving at a verdict and not for the convenience of counsel." Because *Gerhardt* concerns only statutory rights under R.C. 2945.10(G), it cannot be relied on to dispose of claims under the Criminal Rules and the federal and state constitutions.

We conclude that Schiebel should have been allowed the opportunity to inspect the written instructions that were taken into the jury room. Crim. R.30(A) states that "[a]party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict * * *." Schiebel could not object to any discrepancies in the written instructions unless he was given the opportunity to inspect those instructions.

More fundamentally, Schiebel had the right to be present at all critical stages of his trial under constitutional and criminal rule provisions. *Rushen v. Spain, supra*, at 117; Crim. R.43(A). A criminal defendant has a right to be aware of all communications with the jury, including any written jury instructions that are taken into the jury room for deliberations. Although those written instructions may only repeat earlier oral instructions, a defendant nevertheless must be allowed to inspect the written instructions to discover any omissions or discrepancies. Because he was not allowed to inspect the written instructions taken into the jury room, Schiebel was effectively denied this right.

Although we recognize that Schiebel had a right to inspect written jury instructions given to the jury, we nevertheless find that no reversible error occurred when he was denied that right. The defendants' chief contention is that the supplemental oral instructions on good faith, the duty to disclose, and the authority of savings and loans to invest, were omitted from the written instructions. However, this contention is defeated by the trial court's order correcting the record, upheld in this court, which order found that those instructions were reduced to writing and given to the jury. We find no prejudice from the inability of defendants to inspect the written instructions and therefore overrule Schiebel's ninth proposition of law.

Cross-Appeal

I

Change of Venue

In defendant's fifth proposition of law, he challenges the trial court's denial of a motion for change of venue. We have reviewed the voir dire, find his assertions to be without merit, and concur with the disposition of this issue in *State v. Warner, supra*, at Part II. Defendant's proposition of law is overruled.

II

Special Prosecutor

We have examined Schiebel's constitutional challenge to the General Assembly's enactment of Am. S.B. No. 147 for the appointment of a special prosecutor, and for the reasons articulated in *State v. Warner, supra*, at Part I, we find defendant's arguments without merit. Propositions of law eleven and twelve are overruled.

III

In propositions of law six, seven and eight, Schiebel challenges the following as violations of his right to a fair trial: joinder, pursuant to Crim. R. 8(A), of the charges for violating banking laws and the charges for violation of securities laws; denial of his motion for severance of these offenses; and denial of his motion to be tried separately from codefendants Bongard and Warner.

We agree with the court of appeals that defendant was not prejudiced by these rulings, and for the following reasons overrule defendant's propositions of law six, seven and eight.

A

Joinder and Severance of Offenses

Schiebel filed a pretrial motion for severance of the banking counts (counts one to eighty-two), the merger and debenture counts (counts eighty-three to eighty-eight), and the loan counts (counts eighty-nine to ninety-two). The trial court severed the loan counts, but

denied severance and separate trials for the banking and securities counts.

The court of appeals affirmed, holding that Crim.R.8(A) permits the joinder in a single indictment of two or more offenses charged in separate counts if the offenses are "part of a course of criminal conduct."

Crim.R.8(A) provides:

"Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

It is understood that "[j]oinder of offenses is favored because it conserves resources by avoiding duplication inherent in multiple trials and minimizes the possibility of incongruous results that can occur in successive trials before different juries[,]" *State v. Hamblin* (1988), 37 Ohio St. 3d 153, 157-158, 524 N.E. 2d 476, 481 and "'[w]here evidence of each of the joined offenses would be admissible at separate trials, severance is not required because prejudice due to cumulation of evidence or the inference of a criminal disposition is largely absent.'" *State v. Benner* (1988), 40 Ohio St. 3d 301, 306, 533 N.E. 2d 701, 708, citing *State* v. *Hamblin, supra*, at 159, 524 N.E. 2d at 481-482.

Crim. R. 14 provides: "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. * * *"

In *State* v. *Torres* (1981), 66 Ohio St. 2d 340, 20 O.O. 3d 313, 421 N.E. 2d 1288, syllabus, this court held that "[a] defendant claiming error in the trial court's refusal to allow separate trials of multiple charges under Crim. R. 14 has the burden of affirmatively showing that his rights were prejudiced; he must furnish the trial court with

sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial, and he must demonstrate that the court abused its discretion in refusing to separate the charges for trial." See *Opper v. United States* (1954), 348 U.S. 84, 95; *State v. Roberts* (1980), 62 Ohio St. 2d 170, 175, 16 O.O. 3d 201, 204, 405 N.E. 2d 247, 251-252.

Defendant asserts that in *Hamblin* this court upheld joinder of offenses pursuant to Crim R. 8(A) because the two offenses were part of a continuing "course of conduct" and entailed "interlocking evidence" which "linked" the defendant to both sets of offenses which were close in location and time. He alleges that these two elements are absent in this case; that the evidence which was common to the banking law violations and securities law violations did not "interlock" so as to link Schiebel to those separate sets of offenses but was merely repetitive; and that the volume and complexity of the evidence on these counts, when considered in a single trial, confused the jury so that it could not segregate the evidence as to each offense. We disagree.

The court of appeals' opinion summarizes the nature of the counts and evidence as follows:

"* * * Counts one through eighty-two charged Schiebel with misapplication of funds and unauthorized acts in connection with wire transfers of Home State's funds to meet margin calls on the association's repurchase agreements with ESM. Counts eighty-three through eighty-six charged Schiebel with making false or fraudulent representations in connection with the merger and the sale of debentures by, *inter alia*, understating the degree of involvement and dependence between Home State and ESM and failing to disclose negative ODSL directives and comments. Count eighty-seven charged Schiebel with selling debentures with knowledge of Home State's insolvency, and count eighty-eight charged Schiebel with misapplication of funds in connection with the merge of Home State and Home State Financial.

"Count eighty-seven, which is founded upon the debenture sale, and count eighty-eight, which is founded upon the merger, clearly may be joined in a charging instrument with counts eighty-three through eighty-six, which charge violations of the securities laws based on

both events. Schiebel contends, however, that the remaining banking and securities counts were improperly joined when the payments on margin calls and the debenture sale were temporarily separate acts and were not part of a course of criminal conduct.

"Payments of Home State Funds to ESM to meet margin calls, as charged in the banking counts, allegedly led to excessive overcollateralization of Home State's repurchase agreements with ESM. The degree of involvement and dependence between Home State and ESM was a direct function of the association's excessive overcollateralization of its repurchase agreements with ESM, and overcollateralization of the repurchase agreements was the principal subject of ODSL comments and directives. Nondisclosure of the extent of Home State's involvement with ESM and of ODSL comments and directives formed, in part, the fundament for the securities law violations charged in counts eighty-three through eighty-six. Thus, despite the temporal separation between the payments on margin calls and the debenture sale, evidence relevant to the banking counts was inextricably intertwined with evidence relevant to the securities counts. * * *"

Although we disagree with any characterization of this case as one of nondisclosure rather than, as we find, one of affirmative misrepresentation, we nevertheless agree with the court of appeals' conclusions that the evidence for the banking and securities counts were inextricably intertwined and that the trial court did not err in joining or refusing to sever those counts. Judicial economy would not have been served by trying the causes separately.

Furthermore, defendant's claim that the jury was incapable of segregating the voluminous and complex evidence is clearly rebutted by the verdict of acquittal on all of the banking charges. *United States v. Castro* (C.A.9, 1989), 887 F. 2d 988, 998.

B
Separate Trials

Defendant contends that there is no rational basis for joinder of Schiebel's trial on the banking and securities counts with the trial of the "touted principals" in the banking transactions, who were the subject of great adverse publicity shortly before trial. He claims that

joinder led to a verdict of "guilty by association" on the securities counts.

Crim. R. 8(B) provides: "Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

Federal courts, interpreting similar Fed. R. Crim. P. 8, have held that joinder of defendants is proper so long as all defendants participated in the same series of transactions leading to the charges even though not all defendants participated in every act. *United States v. Burreson* (C.A.9, 1981), 643 F. 2d 1344, 1347;[4] *United States v. DePalma* (S.D.N.Y. 1978), 461 F. Supp. 778, 789.[5] Not all defendants need be charged in each count, *United States v. Amick* (C.A.7, 1971), 439 F. 2d 351, 360,[6] nor would differing levels of culpability among defendants necessarily justify severance. *United States v. Clark* (C.A.2, 1985), 765 F. 2d 297, 305.

The standard of review is abuse of discretion, since trial courts are given considerable latitude in determining whether a severance is warranted. *United States v. Reeves* (C.A.8, 1982),674 F. 2d 739, 744. The test is "whether a joint trial is so manifestly prejudicial that the trial judge is required to exercise his or her discretion in only one way—by severing the trial. * * * A defendant must show clear, manifest and undue prejudice and violation of a substantive right resulting from failure to sever. * * *" *United States v. Castro, supra,* at 996; see, also, *United States v. Lane* (1986), 474 U.S. 438, for the proposition that misjoinder is not *per se* reversible error.

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[4] In *Burreson*, three defendants were charged with various federal offenses, including securities fraud, mail fraud and conspiracy as a result of a series of transactions in a scheme to convert mutual funds. Joinder was held to be appropriate.

[5] In *DePalma*, the defendants were charged with securities fraud, bankruptcy fraud, racketeering activity and obstruction of justice. Joinder was permitted.

[6] *Amick* involved eleven defendants and two corporations convicted of violating the Securities Act of 1933 by fraud through use of the mails. Joinder of the defendants was upheld in spite of the fact that the convictions of certain defendants were set aside.

We are not persuaded by the reasoning of *United States v. Cianciulli* (E.D. Pa. 1979), 476 F. Supp. 845, cited by defendant. In *Cianciulli*, twenty-three defendants were charged with violating federal election laws over a three-year period. The district court determined that the number of defendants named in the indictment would require a jury to sit through weeks of trial dealing with dozens of incidents of criminal misconduct which did not involve many of the defendants. Nevertheless, the court cautioned that "[a]ny decision to sever *sua sponte* must ultimately be based upon the individual factual circumstances presented in each case and must involve an examination of the factual and legal similarities and dissimilarities evident in the charges brought against each defendant in relation to the overall criminal scheme alleged. * * *" *Id.* at 848.

We have already held that the joinder of offenses was proper. All three defendants were key decision makers of Home State during the entire period of time upon which all eighty-eight counts were based. The allegations in the indictment focused on each man's activities in causing the final collapse of the institution. Severing the trial would not have resulted in judicial economy or simplified the complex evidence which would have been duplicated for each trial. Bongard was convicted of misapplication of funds and unauthorized acts; Schiebel was not. Warner was convicted on some counts of unauthorized acts; Schiebel was not. The fact that Schiebel was convicted on three of the same securities violations as Warner is insufficient to show manifest prejudice to defendant. The proposition of law is overruled.

IV
Defendant's Absence

As part of his cross-appeal, Schiebel contends that because neither he nor his counsel was present on Saturday morning, February 21, 1987, when the jury was given the written versions of the supplemental instructions, he was denied his right to be present at all stages of the trial as provided in Crim. R. 43(A). The right to be present pursuant to the rule embodies due process principles of the United States and Ohio Constitutions, and defendant's absence during this portion of the trial is asserted as a violation of his right to a fair trial.

See *State v. Williams* (1983), 6 Ohio St. 3d 281, 6 OBR 345, 452 N.E. 2d 1323. This fundamental right is especially important in cases where additional instructions are given to the jury after deliberations are under way. *State v. Grisafulli* (1939), 135 Ohio St. 87, 13 O.O. 440, 19 N.E. 2d 645; see, also, *Sweet v. Clare-Mar Camp, Inc.* (1987), 38 Ohio App. 3d 6, 526 N.E. 2d 74. If a defendant is not present when new, different or substantive instructions are given to the jury, he is unable to review the content, and thereby loses his opportunity to object or cure any error. *Fillippon v. Albion Vein Slate Co.* (1919), 250 U.S. 76; *Shields v. United States* (1927), 273 U.S. 583.

In this instance, we conclude that defendant was not prejudiced by his absence on Saturday morning. The instructions given on Saturday morning had already been given to the jury in the presence of both defendant and counsel on Friday afternoon. The content of three of the four instructions was based on specific requests of the defendants. There was no objection to the content of those oral instructions after they were given on Friday afternoon. See *State v. Blackwell* (1984), 16 Ohio App. 3d 100, 16 OBR 106, 474 N.E. 2d 671. The only question remaining is whether the substance of the additional written instructions given in the absence of Schiebel and his attorney was prejudicial. See *Rogers v. United States* (1975), 422 U.S. 35.

R.C. 2945.10(G) provides that if written instructions are given to the jury, "[s]uch charge * * * or instruction * * * shall not be orally qualified, modified, or explained to the jury by the court. * * *" The four supplemental instructions given orally on Friday afternoon related to (1) the authority of a savings and loan to invest, (2) motive, (3) good faith, and (4) duty to disclose. The question is whether there was a substantial difference between the instructions given orally and the ones reduced to writing.

In Part II[D] of this opinion, we found that there was no requirement to give an instruction on the duty to disclose based on the charges for violating R.C. 1707.44(B), (G), or (J). Therefore, if that instruction did not make its way to the jury, no error occurred. If the instruction did go to the jury, it would have benefitted the defense and harmed the prosecution.

As to the other three disputed charges, we find no variation between the oral and written instructions on motive[7] and good faith.[8] The written instruction on the power to invest[9] contains a variation

[7] The state's requested instruction No. 21 on motive as given orally was as follows: "During argument you heard considerable discussion as to the motives and actions of other persons. If they acted improperly, charges could be brought against them. The only persons on trial here are the defendants, and the sole purpose of this proceeding is to determine whether or not the defendants are guilty or not guilty. It is not to determine the guilt or innocence of other persons on other charges. However, in weighing the testimony, as the Court has told you before, you may consider their motives as going to the weight of their testimony but we're only trying the case of these defendants."

The written instruction submitted by Elleman, attached to his affidavit, reads as follows:

"INSTRUCTION 21

"During argument, you heard considerable discussion as to motives and actions of other persons. If they acted improperly, charges could be brought against them. The only persons on trial here are the defendants and the sole purpose of this proceeding is to determine whether the defendants are guilty or not guilty. It is not to determine guilt or innocence of other persons on other charges. However, in weighing the testimony, as the court has told you before, you may consider their motives as going to the weight of their testimony, but we are only trying the case of these defendants."

[8] The oral instruction on good faith given on Friday afternoon was as follows:

"And if defendant had a good faith belief in the existence of the facts represented, and acted in accordance with the facts as he believed them to do [*sic*], he is not guilty of selling securities fraudulently, as his knowledge is an essential element of that crime."

The written instruction submitted by Elleman, as stated in his affidavit, reads as follows:

"INSTRUCTION 17

"If the defendant had good faith belief in the existence of the facts represented and acted in accordance with the facts as he believed them to be, he is not guilty of selling securities fraudulently, as knowledge is an essential element of that crime."

[9] The instructions given orally on the power to invest was as follows:

"Under Ohio law a savings and loan association may invest any of its funds in bond or interest bearing obligations of the United States, or for which the faith and credit of the United States are pledged for the payment of principal and interest. Furthermore, savings and loan associations are permitted to invest any of their funds in obligations issued or fully guaranteed as to principal and interest by agencies such as the Government National Mortgage Association.

(continued)

which is minor in light of all the other instructions given. The charge must be taken as a whole. "A single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *State v. Price* (1979), 60 Ohio St. 2d 136, 14 O.O. 3d 379, 398 N.E. 2d 772, paragraph four of the syllabus, citing *Cupp v. Naughten* (1973), 414 U.S. 141; cf. *Francis v. Franklin* (1985), 471 U.S. 307; see, generally, *State v. Marra* (Conn. 1985), 489 A. 2d 350, 361; *Flamer v. State* (Del. 1984), 490 A. 2d 104, 128; *Goodwin v. State* (Okla. Crim. App. 1973), 506 P.2d 571.

In *State v. Williams, supra*, defendant raised a constitutional challenge to his conviction based on his absence from trial during a voir dire. This court held: "Errors of constitutional dimension are not *ipso facto* prejudicial. As the United States Supreme Court stated in * * * *Chapman v. California* (1967), 386 U.S. 18, 22: '* * * We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.' In order to be deemed nonprejudicial, error of constitutional stature, either state or federal, must be 'harmless beyond a reasonable doubt.' * * * Particularly, as regards a defendant's constitutional right to be present at all stages of his trial, prejudicial error exists only where 'a fair and

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"In addition, under Ohio law, a savings and loan association may borrow money without limitation, and may pledge and otherwise encumber all of its assets to secure its debt, but that provision does not permit a willful misapplication of funds, nor does it permit an unauthorized use of funds, or a use of funds not authorized by the Board of Directors."

The written version submitted by Elleman in his affidavit is as follows:

"INSTRUCTION 9

"Under Ohio law, a savings and loan association may invest any of its funds in bonds or interest bearing obligations of the United States, or for which the faith and credit of the United States are pledged for the payment of principal and interest. Furthermore, savings and loan associations are permitted to invest any of their funds in obligations issued or fully guaranteed as to principal and interest by agencies such as the Government National Mortgage Association. However, this section does not permit an unauthorized action not permitted by the Board of Directors nor does it permit a wilful [*sic*] misapplica[tion] of funds[.]"

The last sentence was handwritten by Elleman in what appears to be an attempt to conform his proposed instruction to the one read orally on Friday afternoon.

just hearing * * * [is] thwarted by his absence.' *Snyder v. Massachusetts* (1934), 291 U.S. 97, 108. * * *" *Williams, supra*, at 286, 6 OBR at 349, 452 N.E. 2d at 1330.

Disposition of this issue does not rest upon whether defendant waived his presence on Saturday morning. We find the record inadequate to support a finding that Schiebel and his counsel voluntarily absented themselves from the Saturday morning proceedings.

We nevertheless conclude that Schiebel's absence when the supplemental instructions were delivered was harmless beyond a reasonable doubt. The substance of the instructions had been agreed to and given orally in his presence on Friday afternoon. Although the manner of their delivery was inappropriate, we do not believe his presence or absence would have changed the outcome of the verdict given the substantial amount of evidence in support of conviction.

The proposition of law is overruled.

V
Presumptions Under R.C. 1707.29

In proposition of law ten, Schiebel alleges that the trial court improperly instructed the jury that under R.C. 1707.29 defendant could be presumed to have knowledge of certain facts, and that this presumption of knowledge relieved the state of its burden of proof on an essential element of the charges under R.C. 1707.44. We resolve this matter as to both defendants in *State v. Warner, supra*, at Part V, and find defendant's claim of error here to be without merit for the same reasons.

Conclusion

For the reasons stated in this opinion, the judgement of the court of appeals is reversed in case Nos. 89-583 and 90-85, and we reinstate defendant's conviction on counts eighty-three, eighty-five and eighty-six for violation of the securities laws of Ohio.[10]

[10] After the court of appeals reversed the conviction, it vacated the $25,000 costs of prosecution assessed against Schiebel and remanded for further proceedings on this issue. The court found that the award was based on a "statement of costs" submitted by the prosecution which was not certified by the clerk of the court of

Judgement reversed

J.V.CORRIGAN, HOLMES, NAHRA, WRIGHT, H. BROWN and McCORMAC, JJ., concur.

JOHN V. CORRIGAN, J., of the Eighth Appellate District, sitting for SWEENEY, J.

JOSEPH J. NAHRA, J., of the Eighth Appellate District, sitting for DOUGLAS, J.

JOHN W. McCORMAC, J., of the Tenth Appellate District, sitting for RESNICK, J.

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common pleas pursuant to R.C. 2949.14. Because the state has not appealed this judgement ordering a remand on the issue of costs, we will not address the merits of whether R.C. 2949.14 requires certification of the bill of costs before the trial court's order becomes valid. Nevertheless, because we reinstate defendant's conviction, we note that on remand to the trial court, the prosecution may resubmit its statement of costs.

APPENDIX C

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

APPEAL NO. C-870222 TRIAL NO. B-854622

STATE OF OHIO,

Plaintiff-Appellee,

vs.

MARVIN L. WARNER,

Defendant-Appellant.

APPEAL NO. C-870236 TRIAL NO. B-854622

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DAVID J. SCHIEBEL,

Defendant-Appellant.

Criminal Appeals From: Court of Common Pleas
Judgments Appealed From are: Reversed and Causes Remanded
Date of Judgment Entry on Appeal: November 15, 1989

Lawrence A. Kane, Jr., Special Prosecutor for the State of Ohio, Mark A. Vander Laan, Esq., Carl J. Stich, Esq., Kenneth S. Resnick, Esq., M. Gabrielle Hils, Esq., 2500 Fountain Square Plaza, Cincinnati, Ohio 45202, and Jerold H. Israel, Esq., 2037 Winsted Boulevard, Ann Arbor, Michigan 48104, and Anderson, Russell, Kill & Olick, P.C., and John H. Doyle, III, Esq., 666 Third Avenue, New York, New York

10017, for Plaintiff-Appellee, Miller, Cassidy, Larroca & Lewin, William H. Jeffress, Jr., Esq., R. Stan Mortenson, Esq., Seth P. Waxman, Esq., and Julia E. Guttman, Esq., 2555 M Street, N.W., Suite 500, Washington, D.C. 20037, and Robert R. Hastings, Jr., Esq., 22 West Ninth Street, Cincinnati, Ohio 45202, for Defendant-Appellant Marvin L. Warner,

Coolidge, Wall, Womsley & Lombard Co., L.P.A., and Roger J. Makley, Esq., 600 IBM Building, Dayton, Ohio 45402, for Defendant-Appellant David J. Schiebel.

PER CURIAM.

This cause came on to be heard upon the appeals, the transcripts of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

In December 1985, a joint, multi-count indictment was returned against defendant-appellant Marvin L. Warner, defendant-appellant David J. Schiebel, and Burton M. Bongard. The indictment charged Warner, Schiebel and Bongard with willful misapplication of funds and unauthorized acts in violation of R.C. 1153.01 and with state securities law violations in contravention of R.C. 1707.44, in connection with the March 1985 collapse of Home State Savings Bank (Home State). The defendants were tried jointly to a jury, which returned verdicts of guilty against Warner on six counts of unauthorized acts and three counts of securities law violations, against Schiebel on three counts of securities law violations, and against Bongard on forty-one counts of willful misapplication of funds and forty-one counts of unauthorized acts. The trial court sentenced the defendants as appears of record and entered judgment accordingly. From the judgments entered below, Warner and Schiebel have taken the instant appeals in which each appellant advances sixteen assignments of error.[1]

Home State was a savings and loan association, chartered by the State of Ohio, with deposits privately insured by the Ohio Deposit Guarantee Fund (ODGF). Warner was the sole shareholder of Home

[1] Of the sixteen assignments of error asserted by each appellant, twelve are similar. Therefore, although the appeals were filed, briefed and argued separately, we have consolidated them for purposes of this decision.

State and, until July 1977, served as chairman of its board of directors. Bongard served as president of Home State from 1973 and as chairman of the board from July 1977 until May of 1984, when he resigned both positions. Schiebel was a vice-president of Home State and the secretary and managing officer of the association until October 1984, when he became president and chairman of the board. Schiebel continued to serve as president and chairman of the board until March 1985, when Home State closed.

Unauthorized acts

The events that led to Home State's collapse began in the spring of 1977, when Warner met Ronnie Ewton, the president of ESM Government Securities, Inc. (ESM). ESM, based in Fort Lauderdale, Florida, was a broker-dealer specializing in transactions in United States government securities. In April 1977, Home State engaged ESM to serve as its primary broker in its purchases and sales of government securities and in its investments in reverse repurchase agreements.[2] Within three years, Warner and Bongard opened ac-

[2] A repurchase agreement is similar to a collateralized loan, with the securities subject to repurchase pledged as collateral. The repurchase agreements between Home State and ESM took two forms. In the first type of transaction, Home State "sold" securities held in its investment portfolio to ESM, subject to Home State's obligation to repurchase and ESM's obligation to reconvey the securities at a later date for a specified price. The funds paid by ESM to Home State for the securities effectively constituted a loan to Home State from ESM, with the securities pledged by Home State serving as collateral. Home State periodically paid a rate of interest on the borrowed funds and received the coupon interest paid on the securities. In the second type of transaction, Home State purchased securities at a discounted price, and ESM simultaneously extended to Home State a loan, collateralized by the securities purchased. Again, Home State agreed to repurchase and ESM agreed to reconvey the securities at a later date, and Home State's interest payment came due on that date. In both types of transactions, the securities subject to repurchase passed into ESM's possession for the term of the repurchase agreement and could be sold by ESM to third or "contra" parties under additional repurchase agreements.

Whether a transaction is characterized as a repurchase agreement or a reverse repurchase agreement depends on whether the transaction is viewed from the perspective of the party supplying funds or the party acquiring funds. Viewed from Home State's perspective, the transactions were reverse repurchase agreements because Home State was "selling" securities and "borrowing" funds rather than "buying" securities and "lending" funds. See State's Ex. 3, at 18-19.

counts with ESM for investments of their personal funds in repurchase agreements and day trades.[3]

By 1982, the extent and nature of Home State's involvement with ESM prompted concern and criticism by the ODGF and the Ohio Department of Commerce, Division of Savings and Loan Associations (ODSL). The 1982 report of an examination of Home State conducted by the ODSL criticized Home State's excessive overcollateralization of its repurchase agreements with ESM[4] and questioned the association's unusual success in its day-trading activity. In his report, the examiner characterized Home State's excessive overcollateralization of its repurchase agreements as "an unsafe and unsound practice" which "pose[d] a serious risk to the association." State's Ex. 3, at 24. The examiner noted that national examining guidelines consider unacceptable overcollateralization in excess of 105 percent on repurchase transactions involving government obligations and overcollateralization in excess of 110 percent on repurchase transactions involving Government National Mortgage Association securities (GNMAs).[5] He found that the average collateralization on Home State's repurchase agreements with ESM was 211.2 percent and projected that, if ESM defaulted in returning Home State's securities at the end of the repurchase term, Home State faced a loss of $125 million, which would far exceed the combined net worths of Home State and ESM. The examiner also noted that, in twenty-two day-trading transactions conducted through ESM from June 1981 to June 1982, Home State suffered no losses. This unusual success rate caused the examiner to question whether ESM was protecting Home State against losses in its day-trading activity to retain Home State's highly lucrative repurchase business. State's Ex. 3, at 29.

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[3] A "day trade" is the sale of a security made prior to the date that the purchase price of the security is required to be paid or settled. See State's Ex. 3, at 28.

[4] The amount loaned in a repurchase transaction is based on the market value of the securities pledged as collateral. The lender on a repurchase agreement usually will require additional protection from default by the borrower in the form of a "margin" of collateral in excess of the market value of the securities pledged as collateral. State's Ex. 3 at 21. In this sense, a repurchase agreement will typically be "overcollateralized."

[5] The percentage of collateralization represents a ratio of the market value of the securities pledged as collateral to the amount loaned under the repurchase agreement.

The 1982 ODSL examination report served to fuel the ODGF's concern with Home State's repurchase agreements. This concern, which was conveyed by the ODGF to Home State's officers and directors in a series of correspondence, culminated in a letter dated February 25, 1983, from the ODGF to Home State's board of directors, directing the board to formalize by resolution its intention to bring Home State's repurchase agreements in line with the national examining guidelines and to keep future borrowing within those guidelines. At its April 28, 1983, meeting, Home State's board of directors passed a resolution affirming its purpose to comply with the ODGF's February 25 letter.

In March 1983, prior to passage of the board's resolution, but following receipt of the ODGF's February 25 directive, Home State received from ESM a new repurchase proposal for the association and Warner. Schiebel, whose (either appointed or assumed) duty it was to respond to the concerns and criticisms of the ODSL and the ODGF, advised against accepting the proposal, anticipating that the regulators would find it objectionable. Nevertheless, on April 13, 1983, at a meeting with Ewton, ESM's chief investment officer Alan Novick, and Home State's vice-president in charge of investments Gerald Stephens, Warner and Bongard approved the repurchase proposal, pursuant to which Home State purchased $200 million in GNMAs and $400 million in five-year United States Treasury notes and pledged the securities to ESM under a one-year repurchase agreement. The proposal included a matching GNMA futures transaction as a hedge against the risk that, at the end of the repurchase term, an increase in market interest rates would reduce the value of the securities below cost, and the agreement provided for margin calls every thirty days to maintain the level of collateralization.[6] Warner invested $100 million under an identical repurchase agreement and granted Bongard power of attorney on his personal account.

On May 31, 1983, ESM made its first margin call on Home State. Margin calls continued through October 14, 1983, and Home State

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[6] Government securities are subject to a risk that an increase in market interest rates will reduce the market value of the securities or that a decrease in interest rates will raise the market value of the securities. Therefore, under a repurchase agreement, either party might be entitled to make "margin calls" on the other party to maintain the desired percentage of collateralization.

responded with forty-one payments to ESM for a total in excess of $114 million. Although the repurchase agreement permitted margin calls in either direction concomitant with fluctuations in market interest rates, Home State made no margin calls on ESM. With the exception of payment on the July 15, 1983, margin call, which Schiebel approved, Bongard approved Home State's payments on all margin calls through August 1983, and he conceded at trial that his approval of payments on margin calls was given with knowledge that collateralization of the repurchase agreements exceeded the national examining guidelines.

As Schiebel had predicted, the April 1983 repurchase agreement provoked strenuous objections by the regulators. In June 1983, the ODSL examiner who had prepared the 1982 examination report returned to Home State to review the status of the association's repurchase agreements. The examiner noted in his status report that collateralization of the repurchase agreements had been substantially reduced from $125 million to $55 million. He found, however, that Home State's exposure to loss was still substantial because collateralization still exceeded the association's net worth, and that the risk of loss was not reduced by the futures hedge, which merely served to protect against interest rate fluctuations. The ODGF reviewed the ODSL status report. By letter to Home State dated August 9, 1983, the ODGF noted that the report disclosed collaterialization of the April 1983 repurchase agreement in excess of ODGF directives and questioned whether Home State's directors, when presented with the transaction, were made aware that the transaction violated the April 1983 board resolution.

By August 1983, Warner had also become concerned over the April 1983 repurchase agreements. On August 5, Warner, Schiebel, Bongard and Stephens met to review an in-house status report on the repurchase agreements. The report showed that Home State's repurchase agreements were overcollaterized by $32.5 million over the guidelines and that Home State had at risk $73 million. Warner also learned of the margin calls and that payments to ESM in response had resulted in unrealized losses of $20 million on Home State's repurchase agreements and $6 million on his personal account. At an investment meeting on August 29 with Schiebel, Stephens and other investment personnel, Warner withdrew Bongard's power of attorney

over his personal investments and demanded that no further margin calls be met without his knowledge and approval. Schiebel kept Warner apprised of margin calls through memoranda until September 19, 1983, when Warner rescinded the requirement of his personal approval and demanded that he be sent no more memoranda on margin calls made on Home State.

Warner also conveyed to Ewton his distress over the repurchase agreements. On September 6, 1983, Warner and Ewton met to discuss the losses sustained on the repurchase agreements. At Warner's urging, Ewton signed a hand-written note, which was later formalized, in which Ewton agreed that ESM would freeze Home State's losses on the GNMAs, liquidate the GNMAs and substitute one-year treasury bills, and make up Warner's losses on his repurchase agreement. Ewton declined to commit ESM to making up Home State's losses, and it was agreed that margin calls would continue on Home State's repurchase agreements to enable ESM to meet margin calls by the contra parties. From September 7 through October 14, 1983, ESM continued to make margin calls on Home State, and during that period, ESM covered the difference between the margin calls on Warner's account and the amount received by Warner on the futures hedge. By November 1984, ESM had made up losses of $1 million sustained by Warner on his account.

Although margin calls were discontinued after October 14, 1983, criticism by the regulators of Home State's relationship with ESM persisted. In October, Bongard, Schiebel, Ewton and Novick met with ODSL and ODGF officials to discuss the regulators' concerns. Novick assured the regulators that their concern over Home State's position in the event of ESM's bankruptcy was unfounded because Home State was not dealing with ESM as principal on the repurchase agreements but rather with the contra parties. However, Novick's assurances did little to assuage the regulators' doubts. In January 1984, the ODGF directed Home State's board of directors to enter into no more repurchase transactions without prior ODGF approval, and the ODSL requested that the board adopt a policy statement to that effect. The release in April 1984 of the 1983 ODSL examination report provoked further correspondence between the regulators and Home State, with the regulators continuing their criticism of Home State's excessive overcollateralization of its repurchase agreements

and Schiebel assuring the regulators that the association was endeavoring to reduce its repurchase obligations, that ESM acted as agent, not principal, on the repurchase agreements, and that the board of directors had been kept apprised of the magnitude of Home State's repurchase obligations through monthly board reports. Finally, in September 1984, the ODSL notified Home State's board of directors that the association's failure to refrain from excessive overcollateralization of its repurchase agreements had prompted the ODGF to place Home State on its "watch list."

At the time, Home State was, in fact, attempting to improve its position on the repurchase agreements. In June 1984, in response to ODSL criticism that the association had improvidently failed to match the maturities of securities pledged as collateral to the one-year repurchase term, Home State's board of directors approved the exchange of $400 million in five-year treasury notes under a repurchase agreement with ESM for one-year treasury bills. Prompted by the ODGF's contemplation of a regulation limiting its members' involvement in repurchase transactions, Home State endeavored to confine its repurchase agreements to short-term transactions. Home State also proposed to shift away from high-risk corporate repurchase lenders and to confine its repurchase transactions to governmental entities.

However, despite Schiebel's assurances to the regulators that ESM served as agent, rather than principal, on the repurchase agreements and that Home State's collateral stood securely in the hands of the contra parties should ESM go bankrupt, the principal/agency issue became problematic. In July 1984, Schiebel noted in a memorandum to Warner regarding the exchange of treasury notes for treasury bills that confirmation slips for the treasury bills showed that Home State dealt with ESM as principal on the securities and the repurchase agreements, and that reports submitted by ESM's auditors, Alexander Grant & Co., which purported to confirm the contra-party repurchase lenders, had proved unsatisfactory. Schiebel, therefore, sought to obtain from ESM documentation to support the assertion that ESM served in an agency, rather than principal, capacity on the repurchase agreements and to show the location of Home State's collateral. When ESM was not forthcoming, Schiebel prevailed on Warner, then Stephens, to obtain this information. Their efforts continued, without success, through January 1985. Throughout this period of uncertainty,

Schiebel in correspondence with the regulators continued to express confidence in ESM and to assure the regulators that ESM's auditors would verify the status of each repurchase agreement and the location of Home State's collateral in ESM's annual audit report.

Securities law violations

While Home State grappled with its repurchase transactions, its parent corporation, Home State Financial, Inc., (Home State Financial), confronted what soon became a related problem. Warner was the majority shareholder of Home State Financial, and Bongard and Schiebel served as officers and directors of the corporation. In 1979, Home State Financial issued five-year debentures which were due to be redeemed on October 31, 1984. Home State Financial lacked the liquidity to redeem the debt, and ODGF regulations prevented Home State from using its assets to satisfy the debt of its parent corporation. Therefore, Home State Financial determined to roll the debt over by issuing new debentures.

The new debentures were to be sold as a public offering. Thus, in October 1983, Home State Financial engaged outside counsel, Gary Kreider, to assist in registration of the new securities with the Securities and Exchange Commission (SEC). On January 20, 1984, Kreider filed with the SEC a Form S-2 registration statement which proposed the registration of $30 million in debentures to be offered in exchange for the corporation's outstanding debentures and, to the extent that the outstanding debentures were not exchanged, for cash at par value. Kreider sent copies of the S-2 and subsequent amendments to Home State Financial's board of directors and executive officers and to Warner, with a request that the filings be reviewed and an explanation of the potential liability of those individuals if the filing contained material ommisions or misstatements of fact.

The financial statements contained in the S-2 were consolidated for Home State Financial and its subsidiaries and, therefore, included information on Home State's repurchase agreements. SEC comment letters and requested amendments followed the filing of the S-2 and soon hampered the registration process. The principal point of contention became the risks associated with Home State's repurchase agreements. On August 21, 1984, Schiebel, Kreider and Home State

Financial's auditors met with SEC representatives in Washington, D.C. Schiebel, in an effort to quiet the SEC's concerns, assured the SEC representatives that ESM acted as agent, not principal, on the repurchase agreements; he did not, however, disclose Home State's inability to obtain from ESM and its auditors satisfactory confirmation of the contra parties or the location of the securities. By letter dated August 24, 1984, the SEC directed Home State Financial to disclose in its S-2 Home State's repurchase agreements with ESM and the association's recourse should ESM go bankrupt and to amend its Form 10-Q quarterly report for June 30, 1984, to reflect those disclosures.

As the date for redeeming the debentures drew near and the registration process became more ponderous, Home State Financial formulated an alternative plan, *viz.*, the merger of Home State Financial into Home State, with Home State as the surviving entity, thereby enabling Home State, as a bank, to issue debentures exempt from SEC registration. Inquiry into the proposed merger disclosed that a merger would totally eliminate Home State's equity and that the merged entity could not meet savings and loan net worth requirements. However, a merger carried to benefits of exemption from SEC registration requirements and of substantial savings on duplicative administrative costs and reporting requirements. To resolve the equity/net-worth problem, Home State's auditors recommended an infusion of capital by Warner in the form of real estate in exchange for preferred stock of the merged entity and took the position that the real estate could be carried on the books at market value.

In August 1984, Schiebel approached the ODGF and the ODSL with the meger proposal, without disclosing the pending S-2 to either regulatory body. The ODGF approved the meger, subject to twenty conditions, including Warner's contribution of real estate, with Warner guaranteeing the value of the real estate at $23.75 million. The twenty conditions were formalized on February 20, 1985. On August 27, 1984, the merger was approved by the ODSL and by unanimous written consent of the Home State Financial and Home State boards of directors, and the merger became effective as of that date. On October 8, 1984, Kreider applied to the SEC for permission to withdraw the S-2, and on October 15, the SEC issued an order consenting to its withdrawal.

Under the terms of the merger, stock held by the minority shareholders of Home State Financial was redeemed for cash, and Warner became the sole shareholder of the merged entity. As a result of the merger, the outstanding Home State Financial debentures became the obligation of Home State, and despite subsequent withdrawal of the S-2, Home State became responsible for Form 10-K annual reports and Form 10-Q quarterly reports to the SEC on the outstanding debentures.

In September of 1984, Kreider prepared a first draft of an offering circular for the exchange of existing debentures or sale of new debentures and sent a copy to Warner for his comments and revisions. On September 25, the ODSL approved the issuance of the new debentures, and on that date, Home State sent a revised copy of the offering circular to holders of the existing debentures.

The offering circular contained a "pro forma consolidating balance sheet" for the merged entity and its subsidiaries and incorporated by reference information filed with the SEC on Forms 10-K and 10-Q. The balance sheet was prepared by Home State's accounting staff and presented assets under both generally-accepted accounting principles (GAAP) and regulatory accounting principles (RAP). The 10-K and 10-Q on file with the SEC represented, *inter alia*, that Home State and ESM had no continuing agreements, that margin calls on Home State's repurchase agreements with ESM were made with fluctuations in the market, and that ESM acted as agent, not principal, on the repurchase agreements. Neither the offering circular nor the SEC filings disclosed the personal accounts of Warner and Bongard with ESM, ESM's agreement to make up Warner's losses on his repurchase agreement, or ODSL and ODGF criticisms and directives. Copies of the 10-K and 10-Q were placed in each Home State branch office for review by any interested party.

As Home State issued its offering circular, the SEC was awaiting the amendments to the association's 10-Q quarterly report for June 30, 1984, that were requested in August 1984. By letter dated December 12, 1984, the SEC reiterated its request for amendments to Home Sate's 10-Q for June 30, 1984, and further requested amendments to the association's 10-K annual report for December 31, 1983, describing the nature of the association's repurchase agreements with ESM,

outlining Home State's recourse should ESM go bankrupt, and setting forth some justification for Home State's position that ESM was acting as agent on the repurchase agreements despite confirmation slips that indicated that ESM was acting as principal. In January 1985, Schiebel responded in writing to the SEC's December 12 letter, stating that, on Kreider's advice, Home State had reversed its former position that ESM was acting as agent and that Home State's repurchase commitment was with the contra parties. He, therefore, agreed that the association would amend its 10-Q and 10-K reports to disclose that ESM acted as principal on the repurchase agreements and that Home State stood as an unsecured creditor should ESM go bankrupt. On February 19, 1985, Home State filed with the SEC amendments to that effect.

The Collapse of Home State

On January 21, 1985, Ewton revealed to Stephen Arky, Warner's son-in-law and outside legal counsel for ESM, that ESM had sustained massive losses. Arky conveyed what information he could to Warner, who, in turn, contacted Ewton and requested that Ewton apprise him of ESM's circumstances. When Ewton did not respond and then disclosed that he had secured legal counsel, Warner demanded that his personal account with ESM be closed. On January 25, Ewton resigned from ESM. On January 28, Warner's account with ESM was closed, and the funds were wired to a financial institution, unrelated to Home State, in Cincinnati. On February 4, Schiebel circulated, at Warner's request, a memorandum to the executive staff of Home State, demanding that no more memoranda be sent to Warner.

On February 26, at a special meeting of the Home State board of directors, Schiebel advised the board of his futile attempts to obtain from ESM an audited financial statement for 1984 and proposed that he visit ESM's offices in Fort Lauderdale to pursue the matter. On February 28, Jose Gomez, the managing partner of the Fort Lauderdale office of ESM's auditors, Alexander Grant & Co., issued the December 31, 1984, audit report for ESM; the next day, the report was withdrawn. When Schiebel returned from Florida, he reported his finding that ESM's audited financial statements had been falsified for years by Gomez in exchange for "loans" from ESM.

On March 4, 1985, ESM filed a petition in bankruptcy, and it was publicly revealed that ESM had suffered $300 million in losses which had been concealed in false financial statements certified by Gomez. Home State had, at the time, approximately $140 million in government securities under repurchase agreements with ESM, and threatened losses from ESM's bankruptcy exceeded the assets of the ODGF. On March 8, following an informal meeting of the board of directors, Home State closed. A week later, the Governor of Ohio closed all ODGF-insured institutions. Many of these institutions were closed for up to sixty days, and some never reopened.

The original indictment returned against Warner, Schiebel and Bongard in December 1985 set forth fifty-two counts charging them, variously, with violations of R.C. 1153.01 and 1707.44. In August 1986, the indictment was amended to separate the commingled charges of willful misapplication of funds and unauthorized acts, both of which are proscribed under R.C. 1153.01, and the indictment as amended set forth ninty-two counts.

In counts one through eighty-two of the amended indictment, Warner, Schiebel and Bongard were charged with violations of R.C. 1153.01 in connection with forty-one wire transfers of Home State's funds to meet margin calls by ESM on the association's repurchase agreements. Odd-numbered counts one through eighty-one charged that, with each payment in response to a margin call by ESM, the defendants, as officers, directors or agents of Home State, willfully misapplied the association's funds. Even-numbered counts two through eighty-two charged that, in meeting ESM's margin calls, the defendants, as officers, directors or agents of Home State, assigned, transfererd or delivered a note, bond, draft or other written instrument of the association without authorization of the board of directors. In counts eighty-three through eighty-seven, Warner and Schiebel were charged under various subsections of R.C. 1707.44 in connection with the merger of Home State and Home State Financial and the issuance of the offering circular for the sale of Home State's debentures. Count eighty-eight charged that Warner and Schiebel willfully misapplied Home State's funds in violation of R.C. 1153.01 by instituting the merger between Home State and Home State Financial and thereby causing a reduction in Home State's net worth. Finally, counts eighty-nine through ninety-two charged that Warner, Schiebel and Bongard

willfully misapplied Home State's funds in connection with certain loans made at their direction.

The trial court severed counts eighty-nine through ninety-two for separate trial and dismissed counts eighty-four and eighty-eight at the close of the state's case-in-chief. Bongard was convicted on counts one through eighty-two, charging the willful misapplication and unauthorized transfer of funds in violation of R.C. 1153.01. Warner was convicted on even-numbered counts seventy-two through eighty-two, charging the unauthorized transfer of funds on six occasions from August 29 through October 14, 1983, in contravention of R.C. 1153.01. Warner and Schiebel were convicted on counts eighty-three, eighty-five and eighty-six. Counts eighty-three and eighty-five charged that Warner and Schiebel knowingly made or caused to be made, in violation of R.C. 1707.44(B)(4), and issued or published or caused to be issued or published, in violation of R.C. 1707.44(J), false representations in the offering circular and its incorporated material, in that they overstated Home State's shareholders' equity under both GAAP and RAP, understated the degree of involvement and dependence between the association and ESM, and failed to disclose negative ODSL directives and comments. Count eighty-six charged that Warner and Schiebel, in contravention of R.C. 1707.44(G), knowingly engaged in an illegal, fraudulent or prohibited act in selling securities by obtaining approval of the merger without disclosing to the regulators the status of Home State's SEC registration statement and by engaging in the acts charged under count eighty-three and under two other counts (counts eighty-four and eighty-seven) not relevant to this appeal.

I.

Warner, in his first assignment of error, and Schiebel, in his thirteenth assignment or error, question, on constitutional grounds, the trial court's refusal to dismiss the indictment returned against them. Their argument is built specifically upon the asserted facial invalidity of the emergency legislation that brought about the appointment of the special prosecutor who has been solely responsible for the investigation and handling of these criminal cases against them. The statutory creation of the special prosecutor by the General Assembly was

constitutionally infirm, they reason, because it involved an undue legislative encroachment upon an inherently executive function in violation of the structural doctrine of American democratic government known as "separation of powers." Its effect, they conclude, was to invalidate the charges against them in view of the essential role played by the prosecutor in, *inter alia*, the indictment process.

We preface our analysis of the substative issue posed by this tandem of assignments with a point of appellate procedure that has not explicitly been addressed by the parties in the arguments presented to this court: whether their separation-of-powers claim has appropriately been preserved for review on appeal. In this respect, we note that neither Warner nor Schiebel has directed our attention to any part of the trial record that would allow us to conclude that their constitutional challenge to the creation of the special prosecutor was ever put before the trial court for determination. Our own examination of the record discloses that while the parties argued a number of motions in the court below, including one seeking a dismissal of the indictment on constitutional grounds, the specific question that we are now asked to answer on the merits did not, as far as we can discern, find its way into the case prior to this appeal.

The apparent omission of the claim from the proceedings in the trial court is potentially fatal to success on the merits here under *State v. Awan* (1986), 22 Ohio St. 3d 120, 489 N.E. 2d 277, the syllabus of which expresses the following cardinal principle of appellate review in this state:

> Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal.

The *Awan* rule does not, however, create an absolute bar to appellate review. This much has been made clear by the syllabus of *In re M.D.* (1988), 38 Ohio St. 3d 149, 527 N.E. 2d 286, in these terms:

> The waiver doctrine in *State v. Awan* * * * is discretionary. Even where waiver is clear, [a reviewing] court reserves the right to consider constitutional challenges to the ap-

plication of statutes in specific cases of plain error or where the rights and interests involved may warrant it.

In the case *sub judice*, we are not convinced, for reasons to be detailed *infra*, that any plain error can be derived from a general facial attack on the constitutionality of the statute creating a special prosecutor for whatever criminal offenses may have occurred in connection with the collapse of Home State. There are quite obviously, however, significant interests, not only from the standpoint of the parties involved here, but also on the part of the public at large, enmeshed in a determination of the statute's validity on separation-of-powers grounds. Of unquestionable public value is the need for further refinement and exposition of how a doctrine so fundamental to federal constitutional jurisprudence is to work in the context of our own state government. In view of these considerations, we choose, in the exercise of our recognized discretion, to proceed with a merit review of Warner's first and Schiebel's thirteenth assignments without holding the parties to a waiver of their commonly asserted constitutional claim.

Our substantive analysis begins with the proposition that what holds true, in a constitutional sense, for the national government does not necessarily apply with equal force to measure the appropriate relationships among the three branches of state government in Ohio. It is vital to recognize in this respect that separation of powers is a federally based constitutional doctrine for delimiting the exercise of powers at the national level, and that the federal constitution does not impose on the states any particular plan for the distribution of their governmental powers. *Mayor of Philadelphia v. Educational Equality League* (1974), 415 U.S. 605, 94 S. Ct. 1232; *Sweezy v. New Hampshire* (1957), 354 U.S. 234, 256, 77 S. Ct. 1203, 1215 (Frankfurter, J., concurring); *Dreyer v. Illinois* (1902), 187 U.S. 71, 23 S. Ct. 28. See, also, Tribe, American Constitutional Law (1 Ed. 1978), 15-19, Sections 2-1 through 2-4.

Notwithstanding the absence of any federal constitutional requirement, or of any explicit reference in our state constitution, the Ohio Supreme Court has held that a doctrine of separation of powers is implicitly reflected "in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers

granted to the three branches of state government." *South Euclid v. Jemison* (1986), 28 Ohio St. 3d 157, 159, 503 N.E.2d 136, 138. At the same time that it acknowledged the existence of the doctrine in *Jemison*, however, the court conceded that no exact rule can be formulated to determine when and how the doctrine should be applied in a given case. While this may be true in the sense that the inquiry is not always subject to bright-line precision, we are convinced that there is at least an ascertainable and objective general standard to govern the analysis. In our view, the appropriate measure should be whether any provision of the Ohio Constitution can reasonably be construed to preclude the exercise of the power in question by the particular branch of the state government that has endeavored to assert it. Under this general standard, we believe that unconstitutional encroachments upon the separation of powers inherent in Ohio government can occur primarily in one of two ways: (1) when one branch of the government exercises a specific power committed exclusively to another branch, or (2) when the exercise of an otherwise legitimate power by one branch has the effect of substantially entangling that branch in affairs that are regularly the incident of powers constitutionally committed to another branch.

In the case *sub judice*, the challenged exercise of legislative power reads, in material part, as follows:

> A special prosecutor shall be appointed by the attorney general to investigate and prosecute any criminal violations that may have been committed in connection with any events and circumstances that caused any savings and loan association to be placed in the possession of a conservator as of March 15, 1985. * * *
>
> * * *
>
> The special prosecutor appointed pursuant to this section has the authority of special counsel designated by the attorney general, as set forth in section 2939.10 of the Revised Code.
>
> In carrying out his duties under this section, the special prosecutor shall have the power to direct the clerk of any court of common pleas within the state to issue any subpoena * * *. The powers herein enumerated shall be in

> addition to any other powers that the special prosecutor has under other provisions of the Revised Code and the Ohio Rules of Criminal Procedure, and shall terminate upon the special prosecutor's completion of his duties under this section. * * *

Am. S.B. No. 147, at Section 1.

Using the standards that we have held opposite to any application of the separation-of-powers doctrine in Ohio, we conclude that the legislation passes state constitutional muster for three reasons. First, the office of special prosecutor is not specifically addressed in the Ohio Constitution, and its *creation* is this instance cannot, by force of any constitutional provision, reasonably be said to reside implicitly in a branch of state government other than the General Assembly. Second, there are explicit provisions within the Ohio Constitution conferring upon the General Assembly the inherent power to provide for a public officer such as a special prosecutor in the event that the matter is not otherwise specifically addressed in the constitution. Sections 20 and 27, Article II, Ohio Constitution. Third, under the terms of the legislation itself, the General Assembly is not in any manner entangled in the special prosecutor's performance of his duties; once the attorney general appoints an individual to serve in the office, there is, quite simply, no reserved legislative power of supervision, control or oversight over the designated investigative and prosecutorial functions that could be held to manifest an unwarranted encroachment by the General Assembly in the affairs of another branch of the state government. We conclude, therefore, that the indictment in this case was not obtained by an unconstitutionally created special prosecutor, and Warner's first and Schiebel's thirteenth assignments of error are, accordingly, not well taken.

It is next asserted, in Warner's second and Schiebel's fourteenth assignments of error, that the judge presiding below improperly denied a joint pretrial motion in which a specific request for dismissal of the indictment was coupled with an effort to suppress evidence obtained by the special prosecutor for trial. The argument advanced here is related to that given in support of the parties' facial challenge to the legislative creation of the Home State special prosecutor to the extent that it, too, is bottomed upon the doctrine of separation of powers.

What distinguishes it from the constitutional claim that we have already addressed, however, is that the focus is not upon the *creation* of the office itself, but upon the *exercise* of one of the statutory powers conferred upon the office. According to Warner and Schiebel, the largely unfettered power of subpoena given to the special prosecutor by Section 1, Am. S. B. No. 147, and the involvement of the clerk of the court of common please in the exercise of that power, gave rise to an unconstitutional taint in the proceedings below in three ways: (1) by improperly implicating a judicial power (the issuance of subpoenas by the clerk of courts) in a criminal investigation without the existence of a formal case or controversy; (2) by improperly subordinating the judiciary to the special prosecutor; and (3) by divesting the judiciary of its inherent power to rectify abuses of its own process. For the reasons that follow, we reject these claims because no demonstrable prejudice can be said to derive from them on the state of this record.

With respect to the asserted error as it relates to the trial court's refusal to dismiss the indictment, we believe that the matter is effectively settled by our holding in response to the previous tandem of assignments. Given our conclusion that there was no constitutional infirmity in the legislative creation of a special prosecutor to handle these cases, we are not independently aware of, and the parties have not given to us in argument, any recognized legal theory that would allow us separately to conclude that the invalidity or abuse of one power granted to an otherwise legitimate prosecutorial authority should have the effect of invalidating the indictment ultimately returned by the grand jury. In the absence of an appropriate legal basis for the relief sought in this instance, we must conclude that no prejudicial error attended the trial court's denial of the joint motion to dismiss the charges lodged against Warner and Schiebel.

With respect to the other aspect of the asserted error – the trial court's refusal to suppress evidence – we reach the same conclusion while using a somewhat different rationale. As far as we can determine from our own independent review of the record (Warner and Schiebel have not, we note, given any record citations to buttress their assertions), there is no evidence before us to demonstrate precisely when and how the special prosecutor's subpoena powers were exercised in this case. There is, as well, as no showing of what evidence was obtained by the prosecutor as a result of his use of the subpoena

power, and no showing of whether or how any such evidence was used against Warner and Schiebel at trial. Under these circumstances, we are left only to speculate as to what prejudice may have arisen by virtue of the denial of the joint motion to suppress evidence, even if we assume, for purposes of argument, that there is, in the abstract, some basis in law for concluding that an improper exercise of subpoena power can give rise to the unlawful seizure of evidence in a constitutional sense. For this reason, we conclude that the parties have not carried their burden of demonstrating reversible error on the state of this record. Warner's second assignment and Schiebel's fourteenth assignment are, accordingly, without merit.

II.

Warner, in his third assignment of error, and Schiebel, in his first assignment of error, contend that the trial court erred in overruling their motion for a change of venue. This contention is untenable.

Prior to trial, the defendants filed a joint motion seeking a change of venue, contending that a fair and impartial jury could not be empanelled in Hamilton County due to the volume and prejudicial nature of pretrial media coverage and the widespread effect of Home State's collapse on the community. The motion was held in abeyance pending the completion of voir dire and was ultimately overruled.

The Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee the right of a criminal defendant to a trial by an impartial jury free from outside influences. *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 S. Ct. 1507; *State v. Anderson* (1972), 30 Ohio St. 2d 66, 282 N.E.2d 568. Crim. R. 18(B) and R.C. 2901.12(J) provide for a change of venue when it appears to the trial court that a fair and impartial trial cannot be held in the jurisdiction in which the action is pending. The disposition of a motion for change of venue rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of a clear demonstration that the court abused its discretion. *State v. Thompson* (1987), 33 Ohio St. 3d 1, 514 N.E.2d 407, *State v. Swiger* (1966), 5 Ohio St. 2d 151, 214 N.E.2d 417, certiorari denied (1966), 385 U.S. 874, 87 S. Ct. 148.

We reject at the outset the appellants' contention that a change of venue was constitutionally mandated prior to voir dire when the motion for a change of venue was supported by evidentiary material demonstrating the pervasive and prejudicial nature of pretrial publicity and the state failed to respond with evidence to the contrary. The failure of the state to offer evidence to counter the evidence offered in support of a motion for a change of venue does not necessarily establish a prima facie case for granting a change of venue. *State v. Johnson* (1972), 31 Ohio St. 2d 106, 285 N.E.2d 751. Although in "rare cases * * * local publicity [might be] so pervasive and prejudicial that inquiry by voir dire is unnecessary and a change of venue is constitutionally required," *State v. Bayless* (1976), 48 Ohio St. 2d 73, 97, 357 N.E.2d 1035, 1051, vacated on other grounds (1978), 438 U.S. 911, 98 S. Ct. 3135, the media coverage of Home State's collapse and of the resultant crisis within the savings and loan industry was not so inflammatory as to provoke a carnival atmosphere at trial nor so pervasive or intrusive as to render voir dire unnecessary. See *State v. Maurer* (1984), 15 Ohio St. 3d 239, 251, 473 N.E.2d 768, 781, certiorari denied (1985), 472 U.S. 1012, 105 S. Ct. 2714; *State v. Duerr* (1982), 8 Ohio App. 3d 404, 408, 457 N.E.2d 843, 849.

As a general rule, "[t]he examination of jurors on their voir dire affords the best test as to whether prejudice exists in the community against the defendant, and where it appears that opinions as to the guilt of the defendant of those called for examination for jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, in absence of a clear showing of an abuse of discretion." *Swiger, supra*, paragraph one of the syllabus, accord *Thompson, supra* at 5, 514 N.E.2d at 412; *Duerr, supra* at 400, 457 N.E.2d at 849. In the proceedings below, a majority of the prospective jurors disclosed on voir dire that they were, in some sense, aware of Home State's collapse and, to a lesser extent, of Warner's involvement. The right to an impartial jury does not, however, require that jurors be totally ignorant of the facts and issues involved. *Thompson, supra*. Upon voir dire conducted by the court, the prosecution and defense counsel, each prospective juror who was ultimately seated stated, without qualification, that he could put aside any preconceptions he might have concerning the defendants' culpability and render an impartial verdict on the law and evidence presented at trial.

We, therefore, find no abuse of discretion in the trial court's denial of the defendants' motion for change of venue. Accordingly, Warner's third assignment of error and Schiebel's first assignment of error are overruled.

III.

Warner, in his fourth assignment of error, and Schiebel, in his second assignment of error, contend that the trial court erred in denying their challenge for cause of a juror whose deposits at an ODGF-insured savings and loan were frozen by order of the governor following the collapse of Home State. We agree.

As we noted, *supra*, the state and federal constitutions confer upon a criminal defendant the right to trial by a jury composed of unbiased and unprejudiced jurors. Crim. R. 24(B) and R.C. 2945.25 safeguard the right to an impartial jury by subjecting a prospective juror in a criminal prosecution to a challenge for cause when he is, inter alia, "the person alleged to be injured * * * by the offense charged * * *." Crim. R. 24(B)(11); R.C. 2945.25(L); see *State v. Anderson* (1972), 30 Ohio St. 2d 66, 282 N.E.2d 568. By rule and by statute, "[t]he validity of each challenge [for cause] listed * * * shall be determined by the court," and pursuant to R.C. 2945.26, "[c]hallenges for cause shall be tried by the court on the oath of the person challenged, or other evidence * * *." Thus, the exercise of a challenge for cause does not result in summary disqualification of the challenged juror, *State v. Keaton* (1967), 9 Ohio App. 2d 139, 223 N.E.2d 631, certiorari denied (1968), 390 U.S. 971, 87 S. Ct. 1092, and the determination of the validity of the challenge is committed to the sound discretion of the trial court. *State v. Wilson* (1972), 29 Ohio St. 2d 203, 280 N.E.2d 915; *Palmer v. State* (1885), 42 Ohio St. 596.

Prior to voir dire examination of prospective jurors in the proceedings below, defense counsel and the state submitted memoranda to support their differing interpretations of the phrase "person alleged to be injured." The state asserted that Home State, as a corporate entity, was the only "person alleged to be injured" by the offenses charged in the indictment. The defendants urged an interpretation that would include Home State depositors and depositors in other ODGF-insured institutions that were closed in the wake of Home

State's collapse. The trial court made a preliminary determination in favor of a challenge for cause under Crim. R. 24(B)(11) with respect to Home State depositors, but declined to extend the challenge to include depositors at other ODGF-insured institutions.

In a pre-voir dire questionnaire, prospective juror Beth Statt disclosed that she and her husband had funds on deposit at an ODGF-insured savings and loan when Home State collapsed. On voir dire, Statt revealed that, as a result of the governor's order closing ODGF-insured institutions, she was denied access to approximately $2,000 in checking and savings deposits for three to four weeks. During that period, checks that Statt had previously sent to creditors were returned for insufficient funds, and outstanding debts could be met only by cashing her paycheck and obtaining money orders from a nearby bank. Statt acknowledged that she was aware of the causal connection between Home State's collapse and the governor's order closing other ODGF-insured institutions and of Warner's involvement; she asserted, however, that she could be fair and impartial. Statt further admitted that she was inconvenienced by the resultant circumstances. She insisted, however, that she was not so inconvenienced as to harbor resentment against those responsible and that the views expressed by her husband, who was more disgruntled than she, would not influence her judgment.

The defendants had exhausted their peremptory challenges prior to voir dire of Statt. Therefore, upon rejecting the defendants' Crim. R. 24(B)(11) challenge for cause, the trial court accepted Statt as juror.

The evident aim of banking legislation is the protection of bank depositors. *McNary v. State* (1934), 128 Ohio St. 497, 191 N.E. 733. The enumerated causes for which a juror may be challenged reflect recognition of "a fundamental fact of human character" that "one will be prone to favor that side of a cause with which they identify themselves, either economically, socially or emotionally." *Kiernan v. Van Schaik* (C.A. 3, 1965), 347 F.2d 775, 781. Although the disposition of a challenge for cause lies within the discretion of the trial court, this "discretion * * * can[not] be allowed to detract * * * from the guarantee of the constitution that the accused shall be tried by an impartial jury." *Palmer, supra* at 604. With these considerations in mind, we find that Statt's subjective protestations of impartiality

cannot override the objective fact that she suffered direct and immediate economic deprivation which she perceived to be attributable to the collapse of Home State. See *Palmer, supra* at 605. We, therefore, conclude that the trial court abused its discretion in denying the defendants' Crim. R. 24(B)(11) challenge for cause with respect to Statt. Accordingly, we sustain Warner's fourth assignment of error and Schiebel's second assignment of error.

IV.

Schiebel, in his fourth and fifth assignments of error, assails the denial of his pretrial motion to sever the counts of the indictment charging state banking violations from the counts charging state securities law violations, contending that the charges were improperly joined in the indictment and that joinder of the charges for trial was prejudicial. In his sixth assignment of error, Schiebel challenges the denial of his motion to be tried separately from Warner and Bongard. Neither challenge has merit.

A.

Schiebel moved prior to trial for separate trials on the banking counts (counts one through eighty-two and count eighty-eight), the securities counts (counts eighty-three through eighty-seven), and the loan counts (counts eighty-nine through ninety-two). The trial court granted severance of the loan counts, but declined to sever the banking counts from the securities counts. A joint trial on the banking and securities counts resulted in Schiebel's conviction of the securities law violations charged in counts eighty-three, eighty-five and eighty-six and his acquittal on the remaining charges.

Crim. R. 8(A) permits the joinder in a single indictment of two or more offenses charged in separate counts if the offenses are "part of a course of criminal conduct." Counts one through eighty-two charged Schiebel with misapplication of funds and unauthorized acts in connection with wire transfers of Home State's funds to meet margin calls on the association's repurchase agreements with ESM. Counts eighty-three through eighty-six charged Schiebel with making false or fraudulent representations in connection with the merger and

the sale of debentures by, *inter alia*, understating the degree of involvement and dependence between Home State and ESM and failing to disclose negative ODSL directives and comments. Count eighty-seven charged Schiebel with selling debentures with knowledge of Home State's insolvency, and count eighty-eight charged Schiebel with misapplication of funds in connection with the merger of Home State and Home State Financial.

Count eighty-seven, which is founded upon the debenture sale, and count eighty-eight, which is founded upon the merger, clearly may be joined in a charging instrument with counts eighty-three through eighty-six, which charge violations of the securities laws based on both events. Schiebel contends, however, that the remaining banking and securities counts were improperly joined when the payments on margin calls and the debenture sale were temporally separate acts and were not part of a course of criminal conduct.

Payment of Home State funds to ESM to meet margin calls, as charged in the banking counts, allegedly led to excessive overcollateralization of Home State's repurchase agreements with ESM. The degree of involvement and dependence between Home State and ESM was a direct function of the association's excessive overcollateralization of its repurchase agreements with ESM, and excessive overcollateralization of the repurchase agreements was the principal subject of ODSL comments and directives. Nondisclosure of the extent of Home State's involvement with ESM and of ODSL comments and directives formed, in part, the fundament for the securities law violations charged in counts eighty-three through eighty-six. Thus, despite the temporal separation between the payments on margin calls and the debenture sale, evidence relevant to the banking counts was inextricably intertwined with evidence relevant to the securities counts. We, therefore, conclude that joinder in the indictment of the banking charges with the securities charges was proper under Crim. R. 8(A). See *State v. Hamblin* (1988), 37 Ohio St. 3d 153, 524 N.E.2d 476, certiorari denied (1988), ___ U.S. ___, 109 S. Ct. 515.

Crim. R. 14 offers relief from the prejudicial joinder of offenses in a charging instrument. With respect to the severance for trial of counts charged in the same indictment, the Ohio Supreme Court in *State v. Torres* (1981), 66 Ohio St. 2d 340, 421 N.E.2d 1288, held:

> A defendant claiming error in the trial court's refusal to allow separate trials of multiple charges under Crim. R. 14 has the burden of affirmatively showing that his rights were prejudiced; he must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial, and he must demonstrate that the court abused its discretion in refusing to separate the charges for trial.

Id., syllabus.

Schiebel was acquitted of the banking offenses charged in counts one through eighty-two and was convicted only of the securities law violations charged in counts eighty-three, eighty-five and eighty-six. As we determined *supra*, evidence relevant to the banking counts was inextricably intertwined with evidence relevant to the securities counts. Consequently, evidence relevant to the banking counts would be admissible at a trial on the securities counts, and severance of the banking counts from the securities counts would in no way have mitigated potential prejudice due to an accumulation of evidence or the inference of a criminal disposition. See *Hamblin, supra* at 159, 524 N.E.2d at 481-82. Thus, in the absence of an affirmative showing of prejudice arising from joinder for trial of the banking and securities counts, we find no abuse of discretion in the trial court's denial of Schiebel's motion for severance of charges under Crim. R. 14.

B.

Schiebel's challenge to the denial of his motion for a trial separate from Warner and Bongard is equally feckless. Under Crim. R. 8(B), two or more defendants may be joined in a single charging instrument "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct." Relief from joinder of defendants may be afforded under Crim. R. 14 if it appears that the defendant will be thereby prejudiced. A defendant who challenges the denial of his motion for a separate trial on appeal bears the burden of affirmatively demonstrating that his rights were actually prejudiced. *Torres, supra*; *State v. Lundy* (1967), 41 Ohio App. 3d 163, 535 N.E.2d 664.

Schiebel was charged in all counts of the indictment that were tried in the proceedings below; thus, a trial of the charges against Schiebel separate from Warner and Bongard would have done little to reduce the volume of the evidence adduced or the complexity of the issues presented at trial. Schiebel's contention that he was less culpable than Warner or Bongard is in no way dispositive of the issue, because differing levels of culpability do not alone justify severance of defendants. *United States v. Clark* (C.A. 2, 1985), 765 F.2d 297. Finally, the verdicts returned below finding Schiebel guilty of only three securities law violations, while Warner was also convicted of unauthorized acts and Bongard was convicted of misapplication of funds and unauthorized acts, belie Schiebel's contention that a joint trial created a risk of "guilty by association." Thus finding no prejudice arising from a joint trial of Schiebel, Bongard and Warner, we uphold the trial court's denial of Schiebel's motion for a separate trial.

Upon our determination that joinder in the indictment of the banking and securities counts was proper under Crim. R 8(A) and that the trial court did not abuse its discretion in denying severance of charges or defendants under Crim. R. 14, we overrule Schiebel's fourth, fifth, sixth assignments of error.

V.

Schiebel, in his seventh assignment of error, assails the trial court's denial of his motion to strike from counts eighty-three and eighty-five the allegations that the defendants knowingly made or caused to be made, in violation of R.C. 1707.44(B) (4), and issued or published or caused to be issued or published, in violation of R.C. 1707.44(J), false representations in the offering circular and its incorporated material by failing to disclose negative ODSL comments and directives. We find no merit to this challenge.

Schiebel was charged in counts eighty-three and eighty-five with state securities law violations in contravention of R.C. 1707.44(B) (4) and 1707.44(J), respectively. The relevant provisions of R.C. 1707.44 provide as follows:

> (B) No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes;
>
> * * *
>
> (4) Selling any securities in this state.
>
> * * *
>
> (J) No person, with purpose to deceive, shall make, issue, publish, or cause to be made, issued, or published any statement or advertisement as to the value of securities, or as to alleged facts affecting the value of securities, or as to the financial condition of any issuer of securities, when such person knows that such statement or advertisement is false in any material respect.

Citing the rule of strict construction of criminal statutes set forth in R.C. 2901.04(A), Schiebel contends that counts eighty-three and eighty-five, to the extent that they charged violations of R.C. 1707.44(B) and 1707.44(J) based upon the failure to disclose material facts, are fatally deficient because the relevant statutory provisions proscribe only the affirmative act of making, issuing or publishing a false representation.

R.C. 2901.04(A) imposes a rule of restraint on a court in construing a criminal statute by requiring that statutes defining offenses or penalties be "strictly construed against the state and liberally construed in favor of the accused." The Supreme Court of Ohio has held, however, that the ultimate aim of statutory construction is to ascertain and effectuate the intent of the legislature, *Fort Hamilton-Hughes Memorial Hosp. Center v. Southard* (1984), 12 Ohio St. 3d 263, 466 N.E.2d 903, and that the R.C. 2901.04(A) rule of strict construction may not be employed to "override * * * common sense or evident statutory purpose." *State v. Sway* (1984), 15 Ohio St. 3d 112, 116. 472 N.E.2d 1065, 1068. A court must, therefore, apply a rule of reason in construing a criminal statute, *State v. Jacobellis* (1962), 73 Ohio St. 22, 179 N.E.2d 777, reversed on other grounds (1964), 378 U.S. 184, 84 S. Ct. 1676, and the rule of strict construction

is "satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly." *Sway, supra* at 116, 472 N.E.2d at 1068; see, also, *State v. Payne* (Jan. 25, 1989), Hamilton App. No. C-880053, unreported.

R.C. Chapter 1707 does not define what constitutes a "false representation," for purposes of R.C. 1707.44. R.C. 1.42 establishes the rule of construction for words and phrases employed in the Revised Code, providing in relevant part that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.49 further provides that "[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; * * * (D) The common law or former statutory provisions, including laws upon the same or similar subjects; [and] (E) The consequences of a particular construction * * *."

The issue of whether, for purposes of R.C. 1707.44(B)(4) and 1707.44(J), the proscribed act of making, issuing or publishing a false representation includes the failure to disclose a material fact is one of first impression in this jurisdiction. However, under well-settled principles of the law of fraud and deceit, the failure to disclose a material fact, in the presence of a duty to disclose, has consistently been equated with a false representation. See, *e.g., Miles v. McSwegin* (1979), 58 Ohio St. 2d 97, 388 N.E.2d 1367; *Homequity, Inc. v. Duquette* (Mar. 14, 1988), Ross App. No. 1395, unreported; *Klott v. Associates Real Estate* (1974), 41 Ohio App. 2d 118, 322 N.E.2d 690; *Ziliox v. City View Apt. and Storage Co.* (1925), 20 Ohio App. 156, 153 N.E. 183. The principle that holds nondisclosure in the presence of a duty to disclose equivalent to a false representation is based upon the rationale that the failure to disclose a material fact "is, in effect, a representation that what is disclosed is the whole truth." *Stewart v. Wyoming Cattle Ranch Co.* (1888), 128 U.S. 383, 388-89, 9 S. Ct. 101, 103, see, also, *Monsanto Co. v. Rohm & Haas Co.* (1972), 456 F.2d 592, certiorari denied (1972), 407 U.S. 934, 92 S. Ct. 2463 (quoting *Stewart, supra*); *Ziliox, supra*, ("[A] representation that is true as far as it goes may be rendered false by reason of a failure to disclose facts, or, in other words, may be half truth only * * *. [Therefore, a] prospectus is false if, when taken as a whole, it conveys * * * a false

impression as to material facts.") We find this rationale to be equally compelling in a criminal prosecution under R.C. 1707.44. We further find that the resultant construction of the term "false representation" to include nondisclosure when there is a duty to disclose comports with the evident aim of the legislature in enacting securities legislation to preserve the integrity of the state securities system. We, therefore, conclude that the trial court properly declined to strike from counts eighty-three and eighty-five the allegations of nondisclosure of ODSL comments and directives and, accordingly, overrule Schiebel's seventh assignment of error.

VI.

Warner, in his sixth assignment of error, contends that the trial court erred in instructing the jury on the charge of unauthorized acts by omitting the essential element of "intent to injure or defraud," by defining the requisite mental state as "recklessly," and by precluding the jury from finding that the allegedly unauthorized acts were authorized by subsequent ratification by the Home State board of directors. We find no merit in any aspect of this contention.

A.

R.C. 1153.01 provides:

> No president, director, trustee, committee member, secretary, treasurer, attorney, or other officer or agent of a building and loan association shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association; nor shall he issue or put into circulation a warrant or other order, or assign, transfer, cancel, or deliver a note, bond, draft, mortgage, judgment, decree, or other written instrument belonging to the association, or raise or receive money for and in the name of such association, unless authorized to do so by its board of directors.

The portion of R.C. 1153.01 that precedes the semicolon formed the fundament for the offense of willful misapplication of funds charged in odd-numbered counts one through eighty-one of the indictment; the portion following the semicolon formed the fundament for the offense

of unauthorized acts charged in even-numbered counts two through eighty-two.[7] Warner was convicted on even-numbered counts seventy-two through eighty-two.

Even-numbered counts two through eighty-two, charging the defendants with unauthorized acts, alleged that the defendants, "as officers, agents or directors of [Home State] and with intent to injure or defraud the Bank, did * * * assign, transfer or deliver a note, bond, draft or other written instrument belonging to the Bank * * * to ESM, without the authorization of the Bank's Board of Directors * * *." T.d. I, at 122, T.d. II at 115.[8] The trial court, over the defendants' objections, declined to instruct the jury that the requisite mental state for the offense of unauthorized acts was "intent to injure or defraud," as charged in the indictment, or "purposely," as proposed by the defendants, but instead charged the jury that it must find that the defendants acted "recklessly".

As a general rule, criminal liability must be predicated upon a voluntary act or omission performed with the degree of culpability specified by the statute defining the offense. R.C. 2901.21(A). If the statute defining the offense neither specifies the degree of culpability nor plainly indicates a purpose to impose strict liability, proof that the accused acted recklessly is sufficient to support the imposition of criminal liability. R.C. 2901.21(B); *State v. Eustice* (Oct. 5 1988), Hamilton App. No. C-870670, unreported; *State v. Bentz* (1981), 2 Ohio App. 3d 352, 442 N.E.2d 90.

The portion of R.C. 1153.01 that proscribes unauthorized acts neither specifies a culpable mental state nor plainly indicates a purpose to impose strict liability. "Willful," or "purposeful," conduct is a predicate to criminal liability on a charge of willful misapplication of funds under R.C. 1153.01; however, under no rule of statutory con-

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[7] As we noted *supra*, counts one through eighty-two resulted from pretrial amendment of the original indictment to separate the commingled charges of willful misapplication of funds and unauthorized acts.

[8] Separate transcripts of the docket and journal entries, along with separate supplemental transcripts of the docket, were certified on appeal to this court for Warner under App. No. C-870222 and for Schiebel under App. No. C-870236. Hereinafter, reference to the transcript of the docket for App. No. C-870222 will be designated "T.d. I" or "Supp. T.d. I," and reference to the transcript of the docket for App. No. C-870236 will be designated "T.d. II" or "Supp. T.D. II."

struction could that element be found to apply to a charge of unauthorized acts. We further find that the cases cited by Warner in support of his contention that "intent to injure or defraud" is a judicially-imposed element have no application to the portion of R.C. 1153.01 proscribing unauthorized acts. See *Peskind v. State* (1926), 115 Ohio St. 279, 152 N.E. 670; *State v. Keith* (1914), 91 Ohio St. 132, 110 N.E. 188. We, therefore, conclude that the trial court properly instructed the jury that the requisite mental state for the offense of unauthorized acts, as proscribed under R.C. 1153.01, was "recklessly."

B.

In his sixth assignment of error, Warner also assails the trial court's refusal to instruct the jury that subsequent ratification by the Home State board of directors of the acts charged in even-numbered counts two through eighty-two constituted a defense to the crime of unauthorized acts. This challenge is equally untenable.

The defendants introduced into evidence at trial copies of board reports which were distributed to and reviewed by the directors at their monthly meetings and which contained the figures needed to calculate collateralization of the association's repurchase agreements.[9] The defendants thereafter requested that the trial court charge the jury that a board of directors may implicitly ratify, and thereby authorize, a previously unauthorized act if the board, with full knowledge of the facts, either accepted or retained the benefits of the transaction, acquiesced in the transaction, or failed to repudiate the transaction within a reasonable time. The trial court refused the defendants' proposed instruction and, instead, charged the jury that a corporation acts through its board of directors; that corporate acts much be authorized by the board; and that the board may authorize corporate acts in only two ways: (1) by resolution passed at a meeting of the board; or (2) by unanimous written consent of the board.

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[9] The board reports were prepared from a computer printout that contained not only the figures needed to calculate collateralization of the association's repurchase agreements, but the actual collateralization percentages. However, under the report-preparation system developed by Schiebel, the collateralization percentages were not included in the reports.

The court below refused the defendant's proposed instruction on ratification upon its determination that the Revised Code limits corporate acts to those authorized by resolution passed at a formal meeting of the board of directors or by unanimous written consent of the board. See R.C. 1701.59, 1701.62, 1701.54. The Supreme Court of Ohio has implicitly rejected the proposition that the ability of a corporation's board of directors to authorize the acts of its agents is circumscribed by statute. Under the law of agency, a principal may ratify the acts of its agent performed beyond the agent's authority, and ratification relates back to the performance of the act and binds the principal from that time. *State, ex rel. Riley Const. Co., v. Bd. of Education* (1967), 10 Ohio St. 2d 25, 225 N.E.2d 246. Applying such "well-settled principles of the law of agency," the supreme court in *Campbell v. Hospitality Motor Inns, Inc.* (1986), 24 Ohio St. 3d 54, 493 N.E. 2d 239, held that a corporation may be bound on a contract that was neither expressly authorized nor expressly ratified by its board of directors, thus "reaffirm[ing] the [common law] rule that an unauthorized contract entered into by a corporate officer or agent may be impliedly ratified by the corporate board of directors where the directors have actual knowledge of the facts and (1) accept and retain the benefits of the contract, (2) acquiesce in it, or (3) fail to repudiate the contract within a reasonable period of time." *Id.* at 55, 57, 493 N.E.2d at 242.

The issue before us, however, is not whether a corporation's board of directors may authorize corporate acts in ways other than those prescribed by statute, but whether subsequent action or inaction by the board of directors may relieve an officer, director or other agent charged with unauthorized acts of criminal liability. The various federal and state courts that have addressed this issue have uniformly rejected the defense of subsequent ratification, whether express or implied, in a criminal context.

In *Gilbert v. United States* (C.A. 9, 1966), 359 F.2d 285, certiorari denied (1966), 385 U.S. 882, 87 S. Ct. 169, the defendant was an accountant charged with forging his client's endorsements on their tax-refund checks. The defendant conceded that he acted without prior authority to endorse the checks, but argued that his clients, after learning of his actions, ratified or approved his conduct. The Ninth Circuit held that subsequent ratification or approval of the defendant's

actions would not render his conduct less criminal, reasoning that "[i]f [the defendant's] acts constituted a criminal offense, what [his clients] may have done thereafter by way of condonation is totally irrelevant, for the policy of the law is well settled, that a private person may not excuse a criminal act." *Id.* at 287; accord *United States v. Acree* (C.A. 10, 1972), 466 F.2d 1114, certiorari denied (1973), 410 U.S. 913, 93 S. Ct. 962 (Subsequent ratification of unauthorized loans is not a defense to a charge of willful misapplication of funds of a bank in violation of 18 USC § 656.)

In *People v. Lucero* (Colo. App. 1980), 623 P.2d 424, the defendant was charged with forgery and theft for his unauthorized use of a credit card. The defendant argued (1) that the victim consented to the use of the credit card; (2) that in the absence of prior consent to the card's use, the victim ratified the defendant's conduct by volunteering to pay for the charged merchandise; and (3) that the victim did not want the defendant prosecuted. In response to the defendant's first argument, the court found that the victim's prior consent would have vitiated the criminality of the defendant's conduct because the defendant would have lacked a culpable state of mind. However, the court rejected the defendant's remaining arguments on related principles. The court held that subsequent ratification does not constitute a defense to a crime because "crime affects the overall security of the citizenry, not merely the interests of the immediate parties [and] [s]atisfaction of the latter does not imply preservation of the former." *Id.* at 427. The court continued in the same vein in rejecting as irrelevant proffered testimony of the victim regarding his desire that the defendant not be prosecuted. Noting that a prosecution for alleged criminal conduct is initiated and pursued in the name of the state and that the decision to prosecute rests with the district attorney, the court concluded that a complaining witness or victim of a crime is not a party to a criminal prosecution and, therefore, can require neither the prosecution nor the dismissal of a criminal charge.

Other state courts have advanced a similar rationale in rejecting subsequent ratification as a defense to a criminal charge. See, *e.g.*, *Phillips v. State* (1956), 38 Ala. App. 632, 91 So.2d 518 (Ratification, condonation, or settlement of a claim subsequent to the commission of a crime will not disturb a criminal prosecution); *State v. Higgin* (1959), 257 Minn. 46, 99 N.W.2d 902 (Subsequent ratification is not

a defense to forgery if defendant had the requisite intent when the alleged offense was committed); *State v. Tull* (1984), 119 Mo. 425, 24 S.W. 1010 (Condonation of a forgery or an offer to pay the obligation by one whose name was forged does not render it less a crime by the forger); *Lewallen v. State* (1958), 166 Tex. Crim. 287, 313, S.W. 2d 293 (A corporation's board of directors could not ratify by acquiescence defendant's criminal act of embezzlement); *State v. Austin* (1923), 93 W. Va. 704, 117 S.E. 607 (Subsequent ratification by the injured party could not mitigate the accused's guilt).

Recently, the Court of Appeals for Washington County in *State v. Huggins* (Jan. 24, 1989), Washington App. No. 87 CA11, unreported, adopted the stance taken by text writers and other state courts in rejecting ratification as a defense to a charge of forgery in violation of R.C. 2913.31(A)(3). The defendant in *Huggins*, citing *State, ex rel. Riley Const. Co., supra*, argued that subsequent ratification of his conduct by the individual whose name was forged related back to the time of the forgery and thus removed any criminal liability. The court held that, although a principal may ratify the acts of its agent and ratification relates back, the crimes charged were committed when all elements of the crime of forgery converged, and it was then beyond the power of any private individual to bar prosecution or conviction for the crime.

Although we are not bound by the decisions in *Gilbert, Lucero* or *Huggins*, we find the reasoning underlying these decisions to be compelling. We, therefore, hold that the subsequent ratification by Home State's board of directors of Warner's allegedly unauthorized acts would not operate to relieve him of criminal liability and that the trial court properly declined to so charge.

Upon our determination that the trial court properly instructed the jury that "recklessly" was the requisite mental state for the offense of unauthorized acts and properly refused the defendants' proposed instruction on ratification, we overrule Warner's sixth assignment of error.

VII.

In his seventh assignment of error, Warner contends that the trial court erred in granting the state's motion to amend the unauthorized acts counts of the indictment after the jury returned its verdicts. We agree.

The portion of R.C. 1153.01 that proscribes acts taken without board authorization provides in its entirety:

> No president, director, trustee, committee member, secretary treasurer, attorney, or other officer or agent of a building and loan association shall * * * issue or put into circulation a warrant or other order, or assign, transfer, cancel, or deliver a note, bond, draft, mortgage, judgment, decree, or other written instrument belonging to the association, or raise or receive money for and in the name of such association, unless authorized to do so by its board of directors.

However, even-numbered counts two through eighty-two of the indictment, charging the defedants with unauthorized acts, alleged only that the defendants "did * * * assign, transfer or deliver a note, bond, draft or other written instrument belonging to the Bank . . . to ESM, without the authorization of the Bank's Board of Directors * * *." T.d. I, at 122; T.d. II, at 115. After the jury returned its verdicts finding Warner guilty of unauthorized acts as charged in even-numbered counts seventy-two through eighty-two, Warner moved pursuant to Crim. R. 29 for acquittal on the charges, urging that the wire transfers of Home State's funds to ESM to meet margin calls did not constitute "assign[ment], transfer or deliver[y] [of] a note, bond, draft or other written instrument." Prior to sentencing, the state moved to amend the unauthorized acts counts of the indictment to add the alternative allegation that the defendants "issue[d] or put into circulation a warrant or other order" without board authorization. On the day of sentencing, the trial court, over Warner's objection, granted the state's motion to amend the indictment and denied Warner's motion for acquittal.

The Due Process Clause of the Fourteenth Amendment mandates that a state, under whatever charging method it employs, give a

criminal defendant fair notice of the charges against him to permit adequate preparation of his defense. *Koontz v. Glossa* (C.A. 6, 1984), 731 F.2d 365. Section 10, Article I of the Ohio Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury * * *," thereby guaranteeing that the essential facts alleged to constitute the offense for which a criminal defendant is tried will be found in the indictment. *State v. Headley* (1983), 6 Ohio St. 3d 475, 453 N.E.2d 716; *Harris v. State* (1932), 125 Ohio St. 257, 181 N.E. 104. These principles are embodied in Crim. R. 7(D), which provides in pertinent part that:

> The court may at any time before, during, or after a trial amend the indictment, * * * in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *

The acts charged in the unauthorized acts counts of the indictment upon which Warner was tried and the acts added by amendment of those counts after the verdicts were returned are, when taken without board authorization, acts proscribed under the unauthorized acts portion of R.C. 1153.01. Therefore, amendment of the indictment to add the alternative allegation that the defendants "issue[d] or put into circulation a warrant or other order" without board authorization did not change the name of the crime charged.

We find, however, that post-verdict amendment of the unauthorized acts counts did change the identity of the charged offense. In *State v. Woody* (1986), 29 Ohio App. 3d 364, 505 N.E. 2d 646, we held that when a statute contains separate provisions, each of which requires proof of a fact that the other does not, and the original indictment charges the defendant under only one provision, amendment of the indictment to invoke an alternative provision constitutes a violation of Crim. R. 7(D) because it changes the identity of the crime charged. A conviction for unauthorized acts as charged in the indictment under which Warner was tried required proof that he "assign[ed], transfer[ed] or deliver[ed] a note, bond, draft or other written instrument." In contrast, a conviction for unauthorized acts as charged in the indictment as amended post-verdict may be premised, in the

alternative, upon proof that he "issue[d] or put into circulation a warrant or other order." We find that the portion of R.C. 1153.01 that proscribes unauthorized acts sets forth separate offenses, with the identity of each offense determined by the manner and means of conveyance, *see Headley, supra*, and that amendment of the unauthorized acts counts to invoke a provision of the statute not charged in the indictment under which Warner was tried changed the identity of the crime charged in contravention of Crim. R. 7(D). We, therefore, conclude that the amendment was improvidently granted and that Warner was thereby prejudiced. Accordingly, we sustain Warner's seventh assignment of error.

VIII.

In his eighth assignment of error, Warner challenges the denial of his Crim. R. 29 motion for acquittal on the unauthorized acts counts. We find this challenge to be well taken.

As we noted *supra*, after the jury returned its verdicts finding Warner guilty on six counts of unauthorized acts, Warner moved for acquittal on the charges, asserting that the wire transfers of Home State funds to ESM, which were electronic transfers of funds accomplished by computer impulse via the Federal Reserve Board's wire transfer system, did not constitute the "assign[ment], transfer or deliver[y] [of] a note, bond, draft or other written instrument," as charged in the indictment. The state asserts that a wire transfer is the functional equivalent of a check or "draft" or, in the alternative, that a wire transfer is an "order", as charged in the indictment following post-trial amendment.

Our determination on Warner's seventh assignment of error, that post-verdict amendment of the unauthorized acts counts of the indictment was improper, is dispositive of the state's contention that a wire transfer of funds constitutes the issuance or circulation of an "order" for purposes of R.C. 1153.01. The proscribed act of "issu[ing] or put[ting] into circulation a warrant or other order" without board authorization was not properly charged by indictment; therefore, the question of whether a wire transfer constitutes the issuance or circulation of an "order" is not before us. Accordingly, we confine our consideration to the question of whether a wire transfer constitutes an

"assign[ment], transfer or deliver[y] of a note, bond, draft or other written instrument."

In a civil context, we find some authority for the proposition advanced by the state that a transfer of funds by computer impulse may be held to be the functional equivalent of a check. See *State, ex rel. Lignoul v. Continental Ill. Nat'l Bank and Trust Co.* (C.A. 7, 1976), 536 F.2d 176, certiorari denied (1976), 429 U.S. 871, 97 S. Ct. 184 (Although negotiability is the essential characteristic of a check, a card inserted into an off-premises electronic bank facility to obtain money serves the same purpose as a check under the Uniform Commercial Code and in common usage because use of the card constitutes an order on the bank). There exists, however, equally compelling authority for Warner's position that construction of the term "draft," as it is used in R.C. 1153.01, to encompass funds conveyed by computer impulse would amount to judicial legislation by extending the language of the applicable provision beyond the intent of the legislature. See *Evra Corp. v. Swiss Bank Corp.* (C.A. 7, 1982), 673 F.2d 951, certiorari denied (1982), 459 U.S. 1017, 103 S. Ct. 377 (The language of Article 4 of the Uniform Commercial Code cannot be stretched to include electronic transfers because they were not within the contemplation of the drafters); *FDIC v. European American Bank & Trust Co.* (S.D.N.Y. 1983), 576 F. Supp. 950 (To hold that an electronic interbank transfer through the Clearing House Interpayment System is a cashier's check or check of a bank officer, and thus falls within the definition of a "deposit" as defined under 2 USC § 1813[1][4], would stretch the language of the statute beyond what Congress intended).

As we noted in our discussion on Schiebel's seventh assignment of error, we are constrained in construing a criminal statute of R.C. 2901.04(A), which requires that statutes defining offenses or penalties be "strictly construed against the state, and liberally construed in favor of the accused." The rule of strict construction set forth in R.C. 2901.04(A) embraces the "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." *Dunn v. United States* (1979), 442 U.S. 100, 112, 99 S. Ct. 2190, 2197. The practice of "lenity" is based upon the principle, derived from the Due Process Clause, that an individual should not be placed in the position of speculating on whether his conduct is prohibited. The

practice operates as a restraint on the imposition of punishment for an act that is not "plainly and unmistakably proscribed" and thereby "ensure[s] that a legislature speaks with special clarity when marking the boundaries of criminal conduct." Id. at 112, 99 S. Ct. at 2197 (citing *United States v. Gradwell* [1917], 243 U.S. 476, 485, 37 S. Ct. 407, 410).

The unauthorized acts portion of R.C. 1153.01 imposes criminal liability on an agent of a savings and loan association who takes certain action with respect to the association's assets or liabilities without authorization of the board of directors. The unauthorized acts proscribed under R.C. 1153.01 are set forth with specificity. As a general rule of statutory construction, the specific mention of one thing in a statute implies an intent on the part of the legislature to exclude another. *Montgomery Cty Bd. of Commrs. v. Pub. Util. Comm.* (1986), 28 Ohio St. 3d 171, 503 N.E.2d 167. The failure of the legislature specifically to proscribe unauthorized transfers of funds by computer impulse might imply an intent on their part to exclude such transfers; however, it might also suggest that the present ubiquity of transfers by computer impulse was not within the contemplation of the legislature when the statute was enacted.

The portion of R.C. 1153.01 under which Warner was charged and convicted provides that "[n]o * * * director, * * * officer or [other] agent of a building and loan association * * * shall assign, transfer * * * or deliver a note, bond, draft * * * or *other written instrument* belonging to the association * * * unless authorized to do so by the board of directors." (Emphasis added.) In this provision, "note[s]," "bond[s]," and "draft[s]" appear in a category with "other written instruments." In construing a statute under the rule of *noscitur a sociis*, (associated words), any doubt as to the meaning of a word may be removed by reference to the words with which it is associated. *Renfroe v. Ashley* (1958), 167 Ohio St. 472, 150 N.E. 2d 50. We find with respect to the provision of the unauthorized acts portion of R.C. 1153.03 under which Warner was charged that the legislature's use of the catch-all phrase "other written instruments" imposed upon the other instruments within the category, i.e., a "note," "bond" or "draft," a requirement that they be in writing.

The transfer of Home State's funds to ESM were effectuated not by written instrument but by computer impulse, and the only writings evidencing these transfers were "advices" or "debit" slips, generated by BancOhio and Fifth/Third Bank and sent to Home State to confirm transfers of funds to ESM from Home State's accounts with those institutions. We find that the wire transfers of Home State's funds to ESM to meet margin calls did not constitute an "assign[ment], transfer or deliver[y] [of] a note, bond or other written instrument," as charged in even-numbered counts seventy-two through eighty-two of the indictment. Consequently, the record of the proceedings below contains insufficient evidence from which a reasonable trier of fact could have concluded that the elements of the offense of unauthorized acts, as charged in the indictment, had been proved beyond a reasonable doubt. See *State v. Bridgeman* (1978), 55 Ohio St. 2d 261, 381 N.E. 2d 184. We, therefore, sustain Warner's challenge in his eighth assignment of error to the denial of his Crim. R. 29 motion for acquittal on the charges of unauthorized acts.

IX.

Warner, in his fifth assignment of error, and Schiebel, in his eighth assignment of error, contend that the trial court erred in providing the jury with written instructions when defense counsel was not afforded access to the written charge prior to submission of the case to the jury and when the written charge varied materially from the oral charge. Warner further asserts in his fifth assignment of error that the written charge contained erroneous instructions on the relevance of the defendants' motives.

Counsel, over the course of the trial, submitted and presented arguments on proposed jury instructions. In the course of argument, defense counsel requested on two occasions that the trial court make available to counsel, in advance of presentation of the oral charge, a copy of the written charge so that any misunderstanding among the parties regarding the precise wording of the jury instructions could be resolved. The trial court initially responded obliquely, stating that the written charge had not been prepared due to insufficient staff. Ultimately, the court denied the request, characterizing defense counsel's request as "a power play* * * to make me depart from my

normal procedure, to never give the lawyers the charge." T.p. 10989-990.

On Friday, February 20, 1987, the trial delivered its oral charge to the jury and then held an in-chambers conference to entertain objections to the charge. After some discussion, the parties returned to the courtroom, and the court delivered four supplemental instructions, charging the jury:

> (1) on the extent and nature of a savings and loan's ability to invest its funds;
>
> (2) that the motives of a witness may be considered in weighing his testimony;
>
> (3) that on a charge of fraud based upon nondisclosure, there can be no fraud in the absence of a duty to disclose; and
>
> (4) that the defendants' good-faith belief in the existence of the facts as presented in the offering circular would preclude a finding of guilt on the securities law violations charged under R.C. 1707. 44, because knowledge is an essential element of the crime.

The jury then retired to deliberate with a copy of the written charge assembled in a loose-leaf binder. After the jury retired, defense counsel filed a written motion, again requesting disclosure of the written charge. The record reflects no disposition of the motion, thus effectively constituting a denial of the request. See *Forney v. The Cincinnati Reds, Inc.* (Dec. 14, 1988), Hamilton App. No. C-880016, unreported.

The record of the proceedings below certified to this court on appeal included the loose-leaf binder containing the written jury instructions. The binder did not, however, include written copies of the four supplemental instructions delivered orally following the in-chambers conference. This omission formed, in part, the fundament for Warner's fifth assignment of error and Schiebel's eighth assignment of error, advanced in separate appellant briefs filed June 27, 1988. On April 26, 1989 the state filed separate motions in the common pleas court to correct the record pursuant to App. R. 9 (E), requesting that the court below certify to this court a supplemental

record showing that the four supplemental instructions delivered orally after the in-chambers conference were delivered to the jury in written form the following day. The state's motions were supported by affidavits describing the events of the day following delivery of the oral instructions and submission of the case to the jury. The appellants responded with memoranda in opposition to the state's motions, also supported by affidavits.

The affidavits submitted with the state's motions to correct the record included those of an assistant special prosecutor, two court reporters, and the court's constable. The affiants therein averred that on Saturday, February 21, 1987, the day following delivery of the oral charge and submission of the case to the jury, a discussion ensued among the assistant prosecutor, two attorneys on Warner's defense team and the trial judge regarding submission to the jury of written versions of the four supplemental instructions delivered after the in-chambers conference. A court reporter typed the instructions, made copies, and delivered them to Warner's counsel in the courtroom. Warner's counsel entered the judge's chambers, later emerged with the court's constable and the instructions, and continued out of the courtroom and down the hall. The constable averred that the judge handed him "three or four typed pages of instructions" and that he delivered them to the jury room while the jury was in the room, but on a break. He asserted that he placed the typed pages on a table, with the statement that "there were some additional jury instructions for them to consider along with the ones that were in the binder which had been given to them the afternoon before," and then left the room. The court reporter who typed the additional instructions averred that, after the jury returned its verdicts, she was sent to the jury room to collect the trial exhibits. When she arrived, she found members of the press "fishing through boxes and waste paper baskets." The court reporter placed the exhibits on a cart. En route to the exhibit clerk's office, the wheels of the cart became entangled with the cord of a television camera, and the cart tipped, spilling its contents onto the floor. The original copies of the typed instructions are absent from the record, and none of the affiants for the state have attested to their whereabouts. The assistant prosecutor submitted with his affidavit copies of three typed instructions that he had found in his files, "the originals of which [he] believe[d] were among those delivered to the

jury." The court reporter stated that she retained copies of the additional instructions for up to one year after the trial and that the instructions were stored on computer disc for some time, but that the instructions were not now available from either source. She also averred that the typed instructions submitted by the assistant prosecutor "appeared to be among those [she] typed that morning * * *."

The affidavits accompanying the appellants' memoranda in opposition to the state's motions to correct the record included those of two members of Warner's defense team and three jurors. The affiants for the appellants averred that Warner's counsel initially approached the trial judge on Saturday, February 21, to reiterate their request to review a copy of the written charge. When the trial court again refused their request, Warner's counsel, the assistant prosecutor and the judge turned to the question of whether the four supplemental instructions had been added to the written charge. The supplemental instructions were typed, and the judge left his chambers with the instructions in hand, stating his intention to add them to the written charge. Warner's counsel denied ever seeing additional copies of the supplemental instructions. The jurors averred that they did not review or consider any jury instructions other than those contained in the loose-leaf binder. They denied seeing supplemental instructions or anything similar to those proffered by the assistant prosecutor, and none of the jurors could recall the constable discussing or leaving with them any supplemental instructions.

By entry dated May 26, 1989, the court below granted the state's motion to correct the record as to Warner. On June 15, 1989, an identical entry was filed granting the motion to correct the record as to Schiebel. Each appellant thereupon applied for and obtained leave to file two supplemental assignments of error, in which they contend:

> *First Supplemental Assignment of Error*
> The trial court erred in granting the state's motion to correct the record.
>
> *Second Supplemental Assignment of Error*
> The constable's *ex parte* communication with the jury constituted a denial of the right, guaranteed under the Due Process Clause, to a fair trial.

A.

We address first the appellants' challenge to the trial court's refusal to provide defense counsel access to the written instructions prior to submission of the case to the jury. The challenge is feckless. Although it may have proved to be the better practice in the proceedings below, there is no express requirement, statutory or otherwise, that a criminal defendant be furnished with a copy of or be afforded access to a written jury charge prior to submission of the case to the jury. See *State v. Gerhardt* (1961), 115 Ohio App. 83, 184 N.E. 2d 516; *State v. Creager* (August 10, 1983), Tuscarawas App. No. 1665, unreported. (There is no requirement that defendant be furnished with a copy of the written charge before final argument).

B.

Turning to the appellants' challenge to the variations between the written charge and the oral charge, we note that R.C. 2945.10 (G) provides:

> (G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

Crim. R. 30(A), which provides that "[t]he court need not reduce its instructions to writing," supercedes the statutory right to a written charge upon timely request by either party. See Section 5(B), Article IV, Ohio Constitution. The rule does not, however, preclude a trial court from reducing a jury charge to writing and delivering the written charge to the jury for its deliberations, *State v. Whitmeyer* (1984), 20 Ohio App. 3d 279, 485 N.E. 2d 1055, nor does it supercede those portions of R.C. 2945.10(G) with which it is not in conflict. Section

5(B), Article IV, Ohio Constitution; *State v. Rangel* (Dec. 14, 1982), Allen App. No. 1-81-62, unreported. Contra *State v. McGrath* (Nov. 19, 1985), Athens App. No. 1218, unreported; *State v. Mitchell* (Feb. 3, 1983), Cuyahoga App. No. 45014, unreported. Therefore, when a trial court elects to reduce a jury charge to writing and to submit the written charge to the jury for its deliberations, the written charge must be identical to the oral charge in all material respects, and the written instructions must be returned by the jury with their verdicts and kept with the papers of the case.

In the proceedings below, the oral charge was rife with the trial court's qualifications, modifications and explanations of the written charge, and the written charge, when returned by the jury with its verdicts, did not include the four supplemental instructions presented orally following the in-chambers conference. The appellants contend that the variations between the written charge and the oral charge were prejudicial in that the written charge did not include instructions presented orally on the good-faith defense and the duty to disclose, which, they assert, were critical to their defense on the counts of the indictment charging state securities law violations. We find this contention to be well taken.

1.

As we noted supra, the appellants' contention that they were prejudiced by the absence from the written charge of instructions on the good-faith defense and the duty to disclose led the state to file its motions to correct the record. The disposition of these motions led, in turn, to the submission by each appellant of two supplemental assignments of error. Concomitantly with an examination of the issue of whether the written charge varied materially, and thus prejudicially, from the oral charge, we must address the lower court's disposition on the state's motions to correct the record, which the appellants challenge in their first supplemental assignments of error.[10]

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[10] The appellants' first supplemental assignments of error present a challenge not to the judgement of conviction entered below, but to the lower court's ruling on a procedural matter; therefore, we address the challenge as an issue to be considered with Warner's fifth assignment of error and Schiebel's eight assignment of error.

We note at the outset that neither Schiebel nor his counsel was present on Saturday, February 21, 1987, the day on which the supplemental written instructions were discussed and allegedly delivered to the jury. The United States Supreme Court in *Fillippon v. Albion Vein Slate Co.* (1919), 250 U.S. 76, 39 S. Ct. 435, stated that:

> [T]he orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.

Id. at 81, 39 S. Ct. at 435; see, also, *Rushen v. Spain* (1983), 464 U.S. 114, 104 S. Ct. 453; *Rogers v. United States* (1975), 422 U.S. 35, 95 S. Ct. 2091; *Shields v. United States* (1927), 273 U.S. 583, 47 S. Ct. 478 (The *Fillippon* principle is equally applicable in a criminal context). The Supreme Court of Ohio also adheres to a policy against ex parte communications between judge and jury, see, e.g., *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 473 N.E. 2d 264, certiorari denied (1985), 472 U.S. 1032, 105 S. Ct. 3514; *State v. Abrams* (1974), 39 Ohio St. 2d 53, 313 N.E. 2d 823, and that policy is embodied in Crim. R. 43 (A), which guarantees the right of a criminal defendant to "be present at * * * every stage of the trial, including the impaneling of the jury [and] the return of the verdict * * *." Thus, when supplemental instructions are required after a jury has retired to consider its verdict, the delivery of supplemental written instructions to the jury without notice to the defendant and without affording the defendant an opportunity either to be present or to object constitutes reversible error if the possibility exists that the defendant was thereby prejudiced. *Rogers, supra; Fillippon, supra; Jenkins, supra.*

We find that the trial court's delivery to the jury of the supplemental jury instructions in the absence of Schiebel and his counsel constituted a violation of Schiebel's right afforded under Crim. R. 43 (A) to "be present at * * * every stage of the trial * * *." Thus, with respect to Schiebel's challenge in his eighth assignment of error to the variations between the oral and written charge and the challenge in his first supplemental assignment of error to the trial court's disposition on the state's motion to correct the record, the issue remains whether Schiebel was thereby prejudiced.

App. R. 9(E) provides in relevant part:

> (E) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. * * *

The state's motions to correct the record as to Warner and Schiebel were granted upon consideration of memoranda, affidavits and the arguments of counsel and upon the court's finding "that the jury instructions presented orally by the trial court after the chambers conference on February 20, 1987 * * * were delivered in writing to the jury the following day." Supp. T.d. I, at 18; Supp. T.d. II, at 14. Each entry incorporated by reference and, resultantly, was accompanied by that portion of the transcript of the proceedings which reflects the trial court's oral presentation of the four supplemental instructions. See T.p. 11535-537.

Comparing the oral instructions on witness motive, a savings and loan's investment ability, and the good-faith defense with those instructions set forth in the typed pages submitted with the assistant prosecutor's affidavit and proffered as copies of the supplemental instructions delivered to the jury room, we find that they are substantially the same. However, the assistant prosecutor did not attest to the contents or submit a copy of an instruction purporting to be that delivered to the jury room on the duty to disclose. The court reporter who claimed familiarity with the supplemental instructions from typing them could only attest to the three instructions offered by the assistant prosecutor, and the constable testified to delivering only "three or four typed pages of instructions." Consequently, the evidentiary material submitted in support of the state's motion to correct the record does not substantiate the trial court's finding that the oral instruction on the duty to disclose, as reflected in the excised portion of the transcript of the proceedings, was delivered to the jury in written form. We, therefore, find that the court below abused its discretion in granting the state's motions to correct the record as to both Warner and Schiebel to the extent of its finding that an instruction on the duty to disclose was delivered in written form to the jury on the day following submission of the case to the jury.

The state contends that the absence of an instruction on the duty to disclose constituted harmless error when the instruction was neither appropriate nor necessary. We disagree.

Count eighty-six of the indictment, upon which both Warner and Schiebel were convicted, charged that the defendant, in contravention of R.C. 1707.44 (G), knowingly engaged in acts or practices defined as fraudulent under R.C. 1707.01 by selling securities through an offering circular that failed to disclose information material and relevant to an adequate understanding of Home State's financial condition. R.C. 1701.01 (J) defines "fraudulent acts" or "fraudulent practices," in part, as "anything recognized on or after July 22, 1929, as such in courts of law or equity * * *." The Ohio Supreme Court, in defining the elements of fraud, has consistently required proof of a duty to disclose when a charge of fraud is based on an allegation of nondisclosure or concealment of a material fact. See, *e.g.*, *Gaines v. Preterm Cleveland, Inc.* (1987), 33 Ohio St. 3d 54, 514 N.E. 2d 709; see, also, *Schubert v. Neyer* (1959), 90 Ohio L. Abs. 437, 165 N.E. 2d 226. An instruction on the duty to disclose was, therefore, appropriate to the offense charged in count eighty-six.

Warner and Schiebel were also convicted on counts eighty-three and eighty-five, which charged that the defendants knowingly made or caused to be made, in violation of R.C. 1707.44 (B) (4), and issued or published or caused to be issued or published, in violation of R.C. 1707.44 (J), false representations in the offering circular and its incorporated material in that they overstated shareholders' equity, understated the degree of involvement and dependence between Home State and ESM, and failed to disclose negative ODSL comments and directives. As is evident from our discussion on Schiebel's seventh assignment of error, a duty to disclose has consistently been held to be a predicate to liability for nondisclosure of a material fact. See, *e.g.*, *Miles, supra; Ziliox, supra*. Therefore, an instruction on the duty to disclose was equally appropriate to the offenses charged in counts eighty-three and eighty-five.

A criminal defendant is entitled to have the jury instructed on all elements necessary to prove his guilt of an offense with which he has been charged. *State v. Adams* (1980), 62 Ohio St. 2d 151, 404 N.E. 2d 144. We, therefore, conclude that an instruction on the duty to

disclose was both appropriate and necessary to the jury's consideration of its verdicts on the offenses charged in counts eighty-three, eighty-five and eighty-six.

Having thus determined that the court below abused its discretion in granting the motion to correct the record with respect to the instruction on the duty to disclose and that the instruction was both appropriate and necessary to the jury's consideration of its verdicts on counts eighty-three, eighty-five and eighty-six, we hold that the absence from the written charge of an instruction on the duty to disclose constituted error prejudicial to Warner and Schiebel.

With respect to the remaining instructions made a part of the record on appeal upon the state's motions to correct the record, we find that the evidence presented by affidavit discloses a conflict between the constable's assertion that he delivered the supplemental written instructions to the jury room and the contrary assertions of the jurors that they did not receive them. The state contends that the evidence presented on the motions to correct the record was not in conflict when the affidavits of the jurors were inadmissible under Evid. R. 606 (B). We disagree.

Evid. R. 606 (B) provides in relevant part:

> (B) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. * * * His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes.

Evid. R. 606 (B) expressly precluded juror testimony "[u]pon an inquiry into the validity of a verdict or indictment" and is not intended to exclude juror testimony resulting from an inquiry not designed to assess the validity of a verdict or indictment. Evid. R. 606, staff note. As we determined *supra*, the appellants' first supplemental assignments of error present a challenge not to the judgment of conviction

entered below, but to the lower court's ruling on a procedural matter, *viz.*, the state's App. R. 9(E) motion to correct the record. The jurors' affidavits offered in opposition to the state's motions to correct the record do not constitute testimony that resulted from an inquiry into the validity of the verdict or indictment. Therefore, the affidavits were admissible.

In light of the conflicting evidence presented by affidavit on the motions to correct the record, we find that due process considerations require a full and fair hearing on the matter. We, therefore, conclude that the trial court abused its discretion in granting the state's motions to correct the record to include written instructions on witness motive, a savings and loan's investment ability and the good-faith defense without an evidentiary hearing.

2.

A comparison of the written instructions with those presented orally also discloses variations between the oral and written charges on the elements of unauthorized acts. As we noted supra, even-numbered counts two through eighty-two of the indictment, charging the defendants with unauthorized acts in violation of R.C. 1153.01, alleged that the defendants "did * * * assign, transfer or deliver a note, bond, draft or other written instrument belonging to the Bank * * * to ESM, without the authorization of the Bank's Board of Directors * * *." Warner was convicted on even-numbered counts seventy-two through eighty-two. Our review of the written charge discloses that, in four separate instances, the written instructions indicated that the prescribed unauthorized acts with which the defendants were charged included not only the "assign[ment], transfer or deliver[y] [of] a note, bond, draft or other written instrument," but, in the alternative, the "issu[ance] or * * * circulation [of] a warrant or other order." T.d. I, at 414; T.d. II, at 400, pp. 16, 24, 27-28. In delivering the oral charge, the trial court initially instructed the jury that the defendants were charged in counts one through eighty-two with violations of R.C. 1153.01 and then proceeded with a verbatim recitation of the statute in its entirety. T.p. 11472. The court thereafter orally modified the written charge, instructing the jury that the defendants were charged with "transfer[ring] a bond, draft, or note, or other written instrument;"

T.p. 11479; "put[ting] into circulation the bond, warrant or assign[ing] or transfer[ring], or deliver[ing] a note, bond, draft, or other written instrument;" T.p. 11480; and "put[ting] into circulation a bond, or note, or draft, or other written instrument." T.p. 11482.

A trial court must instruct the jury on the law arising from the facts that the evidence tends to disclose, and it is error for the court to charge the jury on issues not made by the pleadings or evidence in the case. *State v. Bissantz* (1982), 3 Ohio App. 3d 108, 444 N.E. 2d 92; see also *Brooks v. Lindsay* (1923), 17 Ohio App. 225. As we noted in our discussion on Warner's seventh assignment of error, the state did not move to amend the indictment to add to the unauthorized acts counts the alternative allegation that the defendants "issue[d] or put into circulation a warrant or other order" until twenty-three days after the verdicts were returned. As we determined in our disposition of that assignment of error, amendment of the indictment was improvidently granted. Our review of the record discloses that, although the state endeavored to adduce some evidence to support its contention that a wire transfer of funds is the functional equivalent of a check or "draft," no evidence was presented to raise the issue of whether a wire transfer is , in effect, "a warrant or other order."

We find that the trial court's oral modification of the written charge on unauthorized acts constituted a violation of R.C. 2945.10(G), and, in light of our discussion on Warner's seventh assignment of error, we cannot say that the variations between the written and oral charges were harmless beyond a reasonable doubt. We, therefore, hold that the trial court erred to the prejudice of Warner when the court orally modified the written charge on the elements of unauthorized acts and delivered to the jury written and oral charges containing elements of the offense upon which Warner was not indicted and on which no evidence was adduced.

C.

Warner further contends in his fifth assignment of error that the trial court erred in its instructions to the jury on the relevance of the defendants' motives. We find no merit to this contention.

In both oral and written form, the jury was instructed on the relevance of the defendants' motives as applied, first, to the offense of willful misapplication of funds, charged in odd-numbered counts one through eighty-one, and, then, to the offense of unauthorized acts, charged in even-numbered counts two through eighty-two. With respect to the offense of willful misapplication of funds, the jury was instructed in oral and written form that "purpose" is an element of the offense, that "[p]urpose and intent mean that same thing," and that "[p]roof of motive is not required [but the] presence or absence of motive is just one of the circumstances bearing upon purpose." T.d. I, at 414; T.d. II, at 400, p. 12; T.p. 11476-477. The written charge further provided that "[w]here an act is a crime, a 'good' motive or purpose is not necessarily a defense, but may be considered as to intent." T.d. I, at 414; T.d. II at 400, p. 12. With respect to the offense of unauthorized acts, the jury was instructed in oral and written form that "[p]roof of motive is not required * * * [but] [t]he presence or absence of motive is one of the circumstances bearing upon purpose or intent" and that " a good motive to also benefit the bank is not a defense." T.d. I, at 414; T. d. II, at 400, p. 24; T. p. 11482-483. In the written charge, the jury was further instructed that "[w]here an act is a crime, a 'good' motive or purpose is not necessarily a defense [but] [m]ay be considered as to intent." T.d. I, at 414; T.d. II, at 400, p. 24. Warner contends that, as a result of the trial court's confusing rendition of the instruction on the relevance of the defendants' motives, the jury was, in effect, instructed that, although the state must prove that the defendants acted purposely, good intent or purpose on their part would not constitute a defense to the crime.

The jury was charged separately on the relevance of the defendants' motives as to the offense of willful misapplication of funds and the offense of unauthorized acts. Only with respect to the offense of willful misapplication of funds was the jury instructed that "purpose" is an element of the offense and that a good purpose was not a defense. Warner was acquitted on odd-numbered counts one through eighty-one charging the willful misapplication of funds. Therefore, any error in the jury charge on the offense of willful misapplication of funds was harmless. Warner was convicted on six counts of unauthorized acts. Upon the trial court's determination that the requisite mental state is "recklessly," the jury was not charged that

"purpose" is an element of the crime of unauthorized acts. Thus, Warner's challenge to the motive instruction on the offense of unauthorized acts is dependent upon his assertion, advanced in his sixth assignment of error, that the requisite mental state is "purposely." We determined in our disposition of Warner's sixth assignment of error that the requisite mental state for unauthorized acts is "recklessly." Therefore, we find no error prejudicial to Warner arising from the jury instruction on the relevance of the defendants' motives.

To summarize, Warner's fifth assignment of error is sustained to the extent that it challenges the variations between the oral and written charges on the duty to disclose and the elements of unauthorized acts. Schiebel's eighth assignment of error is sustained to the extent of his challenge to the variations between the oral and written charges on the duty to disclose. The appellants' first supplemental assignments of error are also well taken upon our determination that the trial court abused its discretion in granting the motion to correct the record to add the written supplemental instruction on the duty to disclose, when the evidence did not support the lower court's finding, and to add the remaining supplemental instructions, when the motion was granted without an evidentiary hearing. With respect to the balance of the appellants' contentions, the assignments of error are overruled.

X.

The appellants contend in their second supplemental assignments of error that the court constable's ex parte communication with the jury constituted a denial of the right to a fair trial. We find this contention to be well taken.

All communications with a jury in a criminal proceeding must be made in the presence of the defendant to afford him the opportunity to object and to be heard. Any communication with a juror during a criminal trial about a matter pending before the jury, when made without full knowledge of the defendant, gives rise to a presumption of prejudice. *Remmer v. United States* (1954), 345 U.S. 227, 74 S. Ct. 450; *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 473 N.E. 2d 264. The burden then shifts to the state to show that the ex parte communication was harmless, *i.e.*, that the jury's verdict could not have

been influenced by the communication. *Remmer, supra; Jenkins, supra.* To raise the presumption of prejudice premised upon an *ex parte* communication with a juror, the complaining party must first demonstrate that the communication occurred without full knowledge of the parties and that it involved substantive matters. *Id.*

The court's constable averred in his affidavit offered in support of the state's motion to correct the record that, at the court's request, he delivered the typed supplemental instructions to the jury room with the statement that "there were some additional jury instructions for them to consider along with the ones which were in the binder which had been given to them the afternoon before." We find that the appellants have raised a presumption of prejudice upon proof that the constable's *ex parte* communication with the jury, which included both his statement to the jury and his delivery to the jury of the supplemental written instructions, which involved substantive matters, and that the state has failed to overcome that presumption with evidence demonstrating that the communication was harmless. We, therefore, sustain the appellants' second supplemental assignment of error.

XI.

Warner and Schiebel advance identical arguments in their ninth assignments of error, in which they challenge the constitutionality of the trial court's instruction to the jury on the securities counts that "[i]n any prosecution brought under Sections 1707.01 to 1701.45 of the Ohio Revised Code...the accused shall be deemed to have had knowledge of any matter of fact where in the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question have secured such knowledge." T.d. I, at 414; T.d. II, at 400, p. 198; T.p. 11501. The challenge is feckless.

Liability under R. C. 1707.44, upon which the securities law violations were premised, must be based upon a finding that the accused acted "knowingly." The appellants contend that the challenged instruction violated their due process rights in that it established a mandatory presumption and relieved the state of the burden of proving an element of the offense.

The instruction, as delivered at trial in both oral and written forms, tracked the language of R.C. 1707.29. In *State v. Trivedi* (1982), 8 Ohio App. 3d 412, 457 N.E. 2d 868, we addressed an identical challenge to the constitutionality of R.C. 1707.29 and held that the presumption of knowledge created thereunder is not mandatory but rebuttable and that the presumption did not relieve the state of the burden of proving that the accused acted knowingly. See, also, *State v. Walsh* (1979), 66 Ohio App. 2d 85, 420 N.E. 2d 1013 (R. C. 1707.29 does not create a presumption, and even if it were so construed, the presumption would be rebuttable and would neither infringe upon the presumption of innocence nor shift the burden of proof to the accused). Our disposition is controlled by our decision in *Trivedi, supra.* Accordingly, we overrule the appellants' ninth assignment of error.

XII.

Warner and Schiebel also present identical demonstrations in their eleventh assignments of error, in which they assert that the trial court erred in making misleading and prejudicial comments in the course of its examination of Bongard and in declining the defendants' request for a curative instruction. We find no merit to this contention.

At trial, each defendant took the stand to testify on his own behalf. Upon completion of direct and cross-examination of each defendant, the trial court questioned the defendant on various aspects of his testimony. At the close of Bongard's testimony, the court inquired into the import of an inter-office memorandum to Bongard on the subject of Warner's security exposure while trading through ESM. See Defendants' Ex. 305. The defendants offered no objection to the interrogation at the time, but subsequently filed a joint motion requesting "clarification of the record" by delivery of the following cautionary instruction:

> Last Thursday, I asked Mr. Bongard some questions about a 1977 memorandum * * * concerning insurance on Mr. Warner's securities at ESM. In the course of my questions, it may have seemed to you that this memorandum indicated ESM was a principal, not an agent. The jury should not take my remarks to reflect any belief on my part that ESM

> was a principal or an agent. The memorandum does not deal with that subject in any way. You are the sole triers of the facts.

T.d. I, at 335; T.d. II, at 324, Appendix A. The motion was discussed in the course of counsel's arguments on jury instructions. The trial court declined to deliver the defendants' proposed instruction, but stated that the respective roles of judge and jury would be addressed in the general charge. T.p. 10703-704.

Evid. R. 614 (B) permits the trial court to interrogate witnesses, provided that the interrogation is conducted in an impartial manner and is designed to develop facts germane to an issue of fact to be determined by the jury. *State v. Hammond* (Dec. 5, 1988), Clinton App. No. CA87-11-026, unreported; *Lodi v. McMasters* (1986), 31 Ohio App. 3d 275, 511 N.E. 2d 123. In the absence of some demonstrations of bias, prejudice or prodding of the witness to elicit particular testimony, it may be presumed that the court conducted its inquiry with impartiality. *Hammond, supra; Jerkins v. Clark* (1982), 7 Ohio App. 3d 93, 454 N.E. 2d 541.

Although the colloquy between the trial court and Bongard regarding the memorandum was less than enlightening, we perceive nothing in the fact, substance or tenor of the court's interrogation to suggest some predilection on the part of the court against Bongard or Bongard's interpretation of the memorandum. The appellants have, therefore, failed to overcome the presumption of impartiality.

We further find that the defendants' proposed cautionary instruction was, in part, improper and, in part, redundant. Had the trial court instructed the jury, as proposed, that the memorandum did not deal with the principal/agency issue, the court would have effectively and improperly usurped the province of the jury as the sole arbiter of the weight to be given the evidence. See *State v. DeHass* (1967), 10 Ohio St. 2d 230, 227 N.E. 2d 212 (The weight to be given the evidence is primarily for the trier of fact). As to the portions of the proposed instruction that might be deemed appropriate and necessary, we note that the jury was repeatedly charged on the separate provinces of judge and jury and, on two occasions, was instructed to the effect that, "[i]f, during the course of the trial the court said or did anything, or if by its questioning witnesses indicated to you what you believe to be the

court's opinion as to the evidence in this case, you are instructed to disregard it." T.p. 11467; T.d. I, at 414; T.d. II, at 400, p. 9; see also T. p. 11519; T.d. I, at 414; T.d. II at 400, p. 219.

Upon our determination that the court's interrogation of Bongard was conducted in an impartial manner and that the substance of the appropriate portions of the defendant's proposed cautionary instructions was encompassed in the general charge, we find no abuse of discretion in the trial court's interrogation of Bongard or in its denial of the defendants' request for a cautionary instruction. See *State v. Williams* (1975), 43 Ohio St. 2d 88, 330 N.E. 2d 891; *Hammond, supra*. We, therefore, overrule the appellants' eleventh assignments of error.

XIII.

Warner and Schiebel, in their tenth assignments of error, assail the balance struck by the jury in weighing the evidence adduced at trial on the securities law violations charged in counts eighty-three, eighty-five and eighty-six. This challenge is untenable.

Counts eighty-three, eighty-five and eighty-six charged Warner and Schiebel with making, issuing or publishing false or fraudulent representations in connection with the Home State-Home State Financial merger and the Home State debenture offering. The appellants' intimate involvement in the activities associated with the merger and debenture sale is well documented, and our extensive and exhaustive exposition of the facts leading to the securities law violations charged in the indictment dispenses with the need for further elaboration. Upon careful review of the record of the proceedings below, assessment of the evidence and all reasonable inferences to be drawn therefrom, and consideration of the credibility of the witnesses, we cannot say that the the jury, in resolving the conflicts in the evidence, lost its way and created such a manifest miscarriage of justice to warrant reversal of the appellants' convictions. See *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S. Ct. 2211; *State v. Martin* (1983), 20 Ohio App. 3d 172, 485 N.E. 2d 717. We, therefore, overrule the appellants' tenth assignments of error.

XIV.

Warner, in his twelfth assignment of error, challenges the $22-million restitution order imposed as part of his sentence. The challenge is well taken.

Warner was convicted on six counts of unauthorized acts and three counts charging securities law violations. Unauthorized acts, as proscribed under R.C. 1153.01, and the securities law violations proscribed under R.C. 1707.44 are felonies of the fourth degree. R.C. 1153.99 and 1707.99. A trial court may require a person who has been convicted of a fourth-degree felony "to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense, as defined in [R.C. 2913.01 (K)], that the person committed." R. C. 2929.11(D), 2929.11(E).[11]

"Property" is defined for purposes of the Revised Code as "any property, real or personal, tangible or intangible, and any interest or license in such property." R.C. 2901.01 (J) (1). In light of this expansive and all-encompassing definition of "property," we find the R.C. 2929.11(E) provision for the imposition of restitution for "property damage caused by [the] offense" to be sufficiently broad to encompass monetary or economic loss attributable to the offenses of which Warner was convicted. Thus, Warner's challenge to the statutory authority for the imposition of restitution is untenable.

A restitution order cannot stand, however, in the absence of a valid conviction of the offenses on which the order is based, *State v. Irvin* (1987), 39 Ohio App. 3d 12, 528 N.E. 2d 1277, or in the absence of a due process ascertainment that the amount of restitution imposed bears a reasonable relationship to the loss suffered. *State v. Williams* (1986), 34 Ohio App. 3d 33, 516 N.E. 2d 1270; *State v. Trivedi* (1982), 8 Ohio App. 3d 412, 457 N.E. 2d 868. The $22-million restitution order imposed as part of Warner's sentence was based on his conviction of unauthorized acts charged in even-numbered counts seventy-two through eighty-two and the securities law violations charged in counts eighty-three, eighty-five and eighty-six. Having sustained Warner's fourth, fifth, seventh, eighth and two supplemental assign-

[11] Restitution may also be imposed as a condition of probation. R.C. 2951.02(C).

ments of error, we are compelled to reverse the judgment of conviction entered on even-numbered counts seventy-two through eighty-two and on counts eighty-three, eighty-five and eighty-six. Even if the judgment of conviction entered below had withstood appellate review, our examination of the record discloses an insufficient evidentiary fundament to support a restitution order in the amount of $22-million. Thus, in the absence of a valid conviction and a sufficient evidentiary fundament to support the $22-million restitution order imposed on Warner, we sustain Warner's twelfth assignment of error.

XV.

Warner, in his thirteenth assignment of error, and Schiebel, in his twelfth assignment of error, assail the trial court's assessment of costs of prosecution against Warner in the amount of $250,000 and against Schiebel in the amount of $25,000. The challenge is well taken.

R.C. 2947.23 empowers a trial court to "include in the sentence [of one convicted of a crime] the costs of prosecution and [to] render a judgment against the defendant for such costs." As with the order of restitution discussed in Warner's twelfth assignment of error, the judgments for costs entered against Warner and Schiebel fall with their judgments of conviction.

We further determine that, even if the convictions entered below had been left undisturbed, the judgments for costs could not stand. R.C. 2949.14 governs the procedure for the entry of a judgment for costs, providing in relevant part:

> Upon conviction of a nonindigent person for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made in such prosecution, * * *. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged and certify to it if correct and legal. Upon certification by the prosecuting attorney, the clerk shall attempt to collect the costs from the person convicted.

In the proceedings below, costs were assessed against Warner and Schiebel upon a "statement of fees" submitted by the state as an exhibit to its memorandum on restitution and costs of prosecution. This "statement of fees" does not bear the certification and seal of the clerk of the court of common pleas, nor was it certified as correct and legal by the prosecuting attorney.

In the absence of a valid judgment of conviction and a properly certified bill of costs, the judgments for costs entered against Warner and Schiebel must be set aside. We, therefore, sustain Warner's thirteenth assignment of error and Schiebel's twelfth assignment of error.

To summarize, we found in our disposition of Warner's eighth assignment of error that the state failed to adduce evidence sufficient in law to support Warner's conviction of unauthorized acts as charged in even-numbered counts seventy-two through eighty-two. We, therefore, reverse the judgment of conviction entered against Warner on even-numbered counts seventy-two through eighty-two and remand to the trial court with instructions that Warner be discharged with respect to those counts.

We further found error prejudicial to Warner and Schiebel in the trial court's denial of the appellants' challenge for cause of juror Beth Statt, in the court constable's *ex parte* communication with the jury, and in the absence from the written jury charge of an instruction, necessary to the jury's consideration of its verdicts on the securities law violations charged in counts eighty-three, eighty-five and eighty-six, on the duty to disclose. We, therefore, reverse the judgments of conviction entered against Warner and Schiebel on counts eighty-three, eighty-five and eighty-six and remand to the trial court for further proceedings according to law.

Finally, we determined in response to Warner's twelfth and thirteenth assignments of error and Schiebel's twelfth assignment of error that neither a restitution order nor a judgment for costs can stand in the absence of a valid judgment of conviction. Accordingly, we set aside the $22-million restitution order imposed on Warner and the judgments for the costs of prosecution entered against Warner and

Schiebel and remand for further proceedings on those matters according to law.

SHANNON, P.J., KLUSMEIER and HILDEBRANDT, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX D

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

Appeal No. C-880072 Trial No. B-854622

STATE OF OHIO,

Plaintiff-Appellee,

vs.

MARVIN L. WARNER,

Defendant-Appellant.

Criminal Appeal from: Court of Common Pleas
Judgment Appealed from is: Reversed and Cause Remanded
Date of Judgment Entry on Appeal: February 22, 1989

Lawrence A. Kane, Jr., Special Prosecutor, Mark A. Vander Laan, Esq., Lawrence R. Elleman, Esq., Carl J. Stich, Esq., Kenneth S. Resnick, Esq., and M. Gabrielle Hils, Esq., 2500 Fountain Square Plaza, 511 Walnut Street, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Miller, Cassidy, Larroca & Lewin, William H. Jeffress, Jr., Esq., R. Stan Mortenson, Esq., Seth P. Waxman, Esq., and Julia E. Guttman, Esq., 2555 M Street, N.W., Suite 500, Washington, D.C. 20037, and Robert R. Hastings, Jr., Esq., 22 West Ninth Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

Per Curiam.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

In this appeal, we are called upon to determine the propriety of the judgment of the Hamilton County Court of Common Pleas overruling the motions of defendant-appellant Marvin L. Warner for leave to file a motion for new trial (hereafter, "motion for leave"). For the reasons that follow, we hold that the trial court erred in denying the motion.[1]

Appellant was convicted on March 30, 1987, of six counts of unauthorized or fraudulent acts as prescribed by R.C. 1153.01 and three counts of securities violations in contravention of R.C. 1701.01 and 1707.44. Appellant appealed the judgment of conviction entered below, and we assigned to that appeal this court's case number C-870222. On April 20, 1987, appellant filed a motion for leave to file a motion for new trial. The trial court overruled the motion on January 19, 1988, and appellant filed his notice of appeal from that entry on January 27, 1988, to which we have assigned this court's case number C-880072.[2]

These appeals were consolidated pursuant to a prior entry of this court. Appellant filed his brief addressing the consolidated appeals on June 27, 1988. On August 10, 1988, this court vacated the previous order of consolidation and ordered that appellant's appeal from the trial court's denial of his motion for leave, C-880072, be submitted for our review initially and independently of appellant's appeal from the trial court's judgment and sentence, C-870222. The trial court's denial of appellant's motion for leave is addressed under appellant's fourteenth assignment of error. On September 1, 1988, appellee State of Ohio (State) filed its brief, in which it addressed only the trial court's refusal to grant appellant's motion for leave.

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[1] On the day that this court heard oral arguments concerning the matter *sub judice*, it also heard arguments pertaining to the related appeal of David J. Schiebel (Schiebel), a co-defendant with appellant Warner in the proceedings below. Schiebel's appeal has been assigned this court's case number C-880102. The instant decision pertains solely to appellant Warner's appeal from the denial of his motion for leave, which has been assigned this court's case number C-880072.

[2] Appellant's notice of appeal of January 27, 1988, designates as matters for appeal the trial court's entries of January 19, 1988, denying his motion for a new trial and motion for leave. As noted above, appellant's assignment of error speaks only to the denial of his motion for leave.

This appeal finds its genesis in the financial crisis that struck the Ohio savings and loan industry in 1985. Appellant and two others were indicted on ninety-two counts alleging misapplication of funds and the transfer of written bank instruments with the intent to defraud Home State Savings Bank (Home State).[3] The record discloses, as is pertinent to this appeal, that approximately one hour after the jury rendered its verdict on March 2, 1987, one of the jurors, John Brady (Brady), had a conversation with the trial judge's constable.[4] Brady testified at the hearing on appellant's motion for leave that, during this conversation, he told the constable that another juror, Larry E. Dalton (Dalton), stated to the jurors during their deliberations that his mother-in-law had had funds on deposit with Home State.[5] Brady further testified that he asked the constable if the existence of Dalton's mother-in-law's account could cause a mistrial. The constable responded in the affirmative and told Brady that it was Brady's decision as to whether to divulge this information and that the case would be concluded upon the imposition of sentence.

Brady again met with the constable on March 17, 1987, and confided that he was suffering pangs of conscience because he had remained silent on the matter of the mother-in-law's account. On a third occasion, Brady told the constable of an interview with

---

[3] At the time of the events preceding the instant indictment, appellant was the owner of Home State. Appellant's co-defendants were Burton M. Bongard, Home State's president until 1983, and David J. Schiebel, Bongard's eventual successor.

[4] Hamilton County Common Pleas Court constables serve the court primarily as law clerks. The record is silent as to whether the constable related the subject of his conversation with Brady to the trial judge. In any event, the record does not demonstrate that the trial court knew or notified counsel of this development.

[5] As will be discussed *infra*, this revelation is contrary to Dalton's *voir dire* responses on the subject of Home State:

> Q. [By an assistant special prosecutor] As you may be aware, this case involves the offense that surrounded the collapse of the Home State Savings Bank, and you might also recall that back about March of 1985 there were also a number of other S & L's closed around that time after Home State closed. Did you know anybody who had deposits in Home State or any other S & L's that ended up closing?
>
> A. Not that I recall.

T.p. 1539.

appellant's wife,[6] at which he failed to relate the matter of the account. Brady explained to the court during the hearing that a condition to his agreement to be interviewed by appellant's representatives was that he would not discuss individual jurors.[7]

On April 5, 1987, appellant's wife contacted another juror, Rita Lafkas (Lafkas), at home. Lafkas agreed to meet with Mrs. Warner at the Lafkas home to confirm Mrs. Warner's identity. In the course of that approximately two-hour discussion, appellant's wife first learned of the mother-in-law's account.[8]

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[6] The record discloses that appellant's wife is an attorney and that she assisted appellant's trial counsel by, *inter alia*, interviewing the jurors in preparation of a defense to a federal indictment.

[7] A review of the hearing transcript reveals that the jury, in its entirety, insisted upon this condition as a prerequisite to being interviewed by counsel. The condition was honored by counsel.

[8] The record contains, *inter alia*, the affidavits of Rita Lafkas and Larry E. Dalton, to which the judge presiding over the hearing below referred. Lafkas averred:

> 1. I sat as a juror in the trial of Marvin Warner, * * * and signed the verdicts returned on March 2, 1987. This affidavit is given at the request of counsel for Marvin L. Warner to verify information within my personal knowledge relating to the trial. No promises or inducements of any kind have been made to me, and this affidavit is given voluntarily of my own free will.
>
> 2. Early in the trial, another juror, Larry Dalton, said to me, "I hate Marvin Warner." When I asked him how he got past *voir dire* he said, "I know how to talk to people in power/what they want to hear." On other occasions, Mr. Dalton made additional prejudicial comments regarding Mr. Warner.
>
> 3. During jury deliberations, Mr. Dalton said his mother-in-law had her money in Home State Bank. I asked why he had not said this at *voir dire* and he said he did not know this then.

Dalton stated, *inter alia*, that at the time of *voir dire*:

> 1. I had no knowledge that any person related to me had had an account at Home State Savings Bank. During the trial, my mother-in-law briefly mentioned she had had money at Home State at some time in the past but did not have any there at the time of the collapse. No time during the trial or jury deliberations did I know when she had money at Home State, the type of account she had, or the amount she had in any account.
>
> 2. At the time she mentioned it, I did not discuss the matter with my mother-in-law because I was not supposed to discuss anything having

The record demonstrates that, immediately after the verdict was rendered, members of the defense team sought to interview the jury. Those jurors who agreed to discuss the case prohibited the subject of other jurors from such interviews.[9] Appellant's counsel sought to abide by this condition. Further, it was admitted that a primary reason for the interviews was to aid the defense team in its preparation for a pending federal trial on charges analogous to those decided by the jury in the case *sub judice*.

At the conclusion of the hearing on appellant's motion for leave, the trial court ruled that appellant had not proven by clear and convincing evidence that he had been unavoidably prevented from timely filing a motion for a new trial based upon alleged misconduct of a

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to do with Home State or the trial with anyone. I did mention this to jurors Rita Lafkas and John Brady in the jury waiting room. The matter did not come up again until weeks after the trial was over.

3. My mother-in-law's statement had no effect whatsoever on my duties as a juror or any deliberations. Consistent with my oath as a juror, I kept an open mind at all times and was fair and impartial to all the defendants. I agree with the verdicts, and our deliberations were based on a careful review and consideration of the documents and testimony from the trial. We deliberated nine days and considered the evidence and how it related to each defendant. My decision was based only on the evidence. In Mr. Warner's case, I felt the evidence was clear to support convictions on some charges but not clear enough to support convictions on many of the charges. The verdict shows that. I had no prejudice against Mr. Warner or the other defendants. What I decided was based only on the trial and the evidence.

4. During the months that the jurors served together we spoke to each other and got to know each other as persons. Rita Lafkas was a person who I enjoyed needling and kidding. Occasionally, I would needle her and say "I hate Marvin Warner" in order to get a rise out of her. This had nothing to do with my views of the man or the evidence and it was not intended to influence her. She had her own views on things. In addition, this joking around had nothing to do with my deliberations or decision as a juror. In fact, I was only vaguely aware of Marvin Warner before the trial.

[9] Brady was one of the jurors who was interviewed on the day the verdict was returned. Lafkas was first interviewed about two days thereafter. However, the Dalton allegations were not broached at that time.

juror.[10] From that judgment, appellant brings this timely appeal under number C-880072 in which he urges in the fourteenth assignment of error of his consolidated brief that the trial court erred by denying his motion for leave to file a motion for a new trial on the basis of juror misconduct. We agree.

Crim. R. 33 governs new-trial motions in criminal cases and provides in pertinent part:

> (A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> * * *
>
> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
>
> * * *
>
> (B) Motion for New Trial: Form, Time. Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.
>
> * * *
>
> (C) Affidavits Required. The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit.
>
> * * *

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[10] The court reasoned in part:

> I feel the defendant in this case did have an opportunity to talk to some of the other jurors immediately after the verdict was rendered and I think he could have determined these irregularities if there had been more effort on their part.

T.p., January 14, 1988, at 105.

After reviewing the record, we conclude that the lower court erred when it denied appellant's motion for leave. Keeping in mind that the focus of the proceedings below, as well as our review, was solely on the issue of whether appellant was unavoidably prevented from timely filing a motion for a new trial, as set forth under Crim. R. 33, we hold that appellant sustained his burden at the hearing on the motion for leave by clear and convincing evidence. The process of interviewing the trial jurors, including Brady and Lafkas, was commenced by appellant's counsel immediately after the verdict was announced. Appellant's wife again met with Brady at least two weeks prior to the imposition of sentence. During all interviews, counsel respected each juror's prerequisite for postverdict discussions and did not broach the subject of another juror's conduct. Additionally, Brady informed a court attache of the existence of the Home State account of Dalton's mother-in-law within minutes of the verdict, yet nothing in the record indicates that this information was transmitted to counsel by the court. Finally, while not a controlling factor, appellant's motion for leave was filed seven days outside of the time prescribed by Crim. R. 33 for new trial motions based upon misconduct of the jury.[11]

Accordingly, appellant's fourteenth assignment of error, as advanced under appeal number C-880072, is sustained. The judgment of the court of common pleas denying appellant's motion for leave is reversed and this cause is remanded to that court for further proceedings consistent with this decision and law.

HILDEBRANDT, P.J., SHANNON and KLUSMEIER, JJ.

PLEASE NOTE: The Court has placed of record its own entry in this case on the date of the release of this Decision.

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[11] Appellant's motion for leave and his motion for a new trial, in which it was argued that the alleged juror misconduct constituted newly discovered evidence, were filed within the time permitted for a new-trial motion based upon newly discovered evidence, *i.e.*, 120 days after the journalization of the sentencing entry. Crim. R. 33 differentiates between misconduct of the jury and newly discovered evidence as grounds for a new trial and assigns different time limitations to such grounds. As such, appellant's reliance on the proposition that evidence of jury misconduct constitutes newly discovered evidence under Crim. R. 33 is misplaced. See *State v. Walden* (1984), 19 Ohio App. 3d 141, 483 N.E. 2d 859. While this issue is addressed in footnote 42 to appellant's brief, Appellant's Brief at 112-13, it is not denominated within the assignment of error *sub judice*, and therefore, it will not be passed upon in this decision. See App. R. 12(A).

APPENDIX E

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

APPEAL NO. C-880102
TRIAL NO. B-854622

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DAVID J. SCHIEBEL,

Defendant-Appellant.

Criminal Appeal from: Court of Common Pleas
Judgment Appealed from is: Reversed and Cause Remanded
Date of Judgment Entry on Appeal: February 22, 1989

Lawrence A. Kane, Jr., Special Prosecutor, Mark A. Vander Laan, Esq., Lawrence R. Elleman, Esq., Carl J. Stich, Esq., Kenneth S. Resnick, Esq., and M. Gabrielle Hils, Esq., 2500 Fountain Square Plaza, 511 Walnut Street, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Coolidge, Wall, Womsley & Lombard Co., L.P.A., and Roger J. Makley, Esq., 600 IBM Building, Dayton, Ohio 45402, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

Defendant-appellant David J. Schiebel has taken the instant appeal from the entry of judgment overruling his motion for new trial

on the basis of newly discovered evidence and his motion for leave to file a motion for new trial on the basis of jury misconduct. On appeal, appellant presents a single assignment of error in which he challenges the denial of his motion for leave to file a motion for new trial.[1] The challenge is well taken.

The record discloses that the court below considered and denied appellant's motion for leave to file a motion for new trial upon the evidence presented at a hearing on an identical motion filed by appellant's co-defendant at trial, Marvin L. Warner. For the reasons set forth in our decision in *State v. Warner* (Feb. 22, 1989), Hamilton App. No. C-880072, unreported, we find that the trial court erred in denying appellant's motion for leave to file a motion for new trial on the basis of jury misconduct. Therefore, we sustain appellant's sole assignment of error, reverse the judgment of the court below denying appellant's motion for leave, and remand for further proceedings consistent with law.

HILDEBRANDT, P.J., SHANNON and KLUSMEIER, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

---

[1] The sole assignment of error presented for our review in the instant appeal is designated as the third assignment of error in appellant's brief filed June 27, 1988, under appeal numbers C-870236 and C-880102.

APPENDIX F

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

Case No. B854622
(Judge Ruehlman)

STATE OF OHIO,

Plaintiff,

vs.

MARVIN L. WARNER, et al.,

Defendants.

ENTRY GRANTING STATE OF OHIO'S
MOTION TO CORRECT THE RECORD AND
CERTIFYING SUPPLEMENTAL RECORD
IN APP. NO. C87-0222

This matter came before the Court on the State of Ohio's motion to correct the record pursuant to App. R. 9(E). After consideration of the memoranda, affidavits and arguments of counsel for the State of Ohio and the defendant, Marvin L. Warner, the court finds the motion well taken and hereby certifies a supplemental record in App. No. C87-0222 that shows that the jury instructions presented orally by the trial court after the chambers conference on February 20, 1987 (T.p. 11535-11537, see attached) were delivered in writing to the jury the following day.

The clerk of courts is directed forthwith to certify this entry and supplemental record to the Court of Appeals in App. No. C87-0222, *State of Ohio v. Marvin L. Warner.*

SO ORDERED:

/s/
Hon. Robert P. Ruehlman

DATE: May 25, 1989

APPROVED:

/s/

L[illegible]ence A. Kane, Jr.
Special Prosecutor for the State of Ohio
2500 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200

/s/

Robert R. Hastings, Jr.
22 West Ninth Street
Cincinnati, Ohio 45202
(513) 721-7500

Attorney for Defendant
Marvin L. Warner

[Attachment:]

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

Court of Appeals Nos. C-870220, C-870222, C-870236

Volume 56

Case No. B-854622

STATE OF OHIO,

Plaintiff,

vs.

MARVIN L. WARNER,
DAVID J. SCHIEBEL,
BURTON M. BONGARD,

Defendants.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that upon the trial of this cause, on November 17, 1986 through March 2, 1987, and March 30, 1987, before the Honorable Richard A. Niehaus, one of the Judges sitting in the said Court of Common Pleas, the following proceedings were had, to wit:

* * *

APPEARANCES:

On behalf of the State of Ohio:

Lawrence Kane, Esq.
Mark Vanderlaan, Esq.
John Doyle, Esq.
Carl Stich, Esq.
Lawrence Elleman, Esq.
Kenneth Resnick, Esq.

On behalf of Defendant Marvin Warner:

Herbert Miller, Esq.
William Jeffress, Esq.
Seth Waxman, Esq.
Stanley Mortenson, Esq.
Thomas Miller, Esq.

On behalf of Defendant Burton Bongard:

Armistead Gilliam, Esq.
Stephen Butler, Esq.
Marvin Gersten, Esq.

On behalf of Defendant David Schiebel:

Roger Makley, Esq.

* * *

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FRIDAY, FEBRUARY 20, 1987

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Jury Charge	11458
Verdict	11557
Bond hearing	11571

* * *

...representation is, that it constitutes an omission, and we think the supreme court says under that instance you're bound to instruct the jury that there is no – that failure to speak in a false representation case is not a crime unless there's a duty to do so, and we've given you the language out of the supreme court decision.

MR. ELLEMAN: Your Honor, I would say you've already instructed with respect to that by saying that you can't disclose part of the truth, but not – without disclosing all of the truth.

THE COURT: What?

MR. ELLEMAN: You've already instructed with regard to that.

THE COURT: I think it's pretty clear, but it's not going to hurt anything.

MR. MAKLEY: Show me as joining in those objections as well.

(The following proceedings were had in the presence of the jury.)

THE COURT: During argument, you heard considerable discussion as to the motives and actions of other persons. If they acted improperly, charges could be brought against them. The only persons on trial here are the defendants, and the sole purpose of this proceeding is to determine whether or not the defendants are guilty or not guilty. It is not to determine the guilt or innocence of other persons on other charges. However, in weighing the testimony, as the Court has told you before, you may consider their motives as going to the weight of their testimony, but we're only trying the case of these defendants.

Under Ohio law, a savings and loan association may invest any of its funds in bonds or interest bearing obligations of the United States, or for which the faith and credit of the United States are pledged for the payment of principal and interest.

Furthermore, savings and loan associations are permitted to invest any of their funds in obligations issued or fully guaranteed as to principal and interest by agencies such as the Government National Mortgage Association.

In addition, under Ohio law, a savings and loan association may borrow money without limitation, and may pledge and otherwise encumber all of its assets to secure its debts, but that provision does not permit a willful misapplication of funds, nor does it permit an unauthorized use of funds, or a use of funds not authorized by the Board of Directors.

In counts 83, 85, and 86, in regard to — fraudulent misrepresentation is when an allegation of fraud is based upon no disclosure. There can be no fraud absent a duty to speak by the one charged of engaging in the fraud.

And another part of the section involving 1707.29 states if the defendant had a good faith — this is the presumptive statute as to one should know — that one is charged with knowing that which one with reasonable diligence should have known.

And if the defendant had a good faith belief in the existence of the facts represented, and acted in accordance with the facts as he believed them to do, he is not guilty of selling securities fraudulently, as his knowledge is an essential element of that crime.

After you retire, select a foreman or forelady and whenever all twelve — all twelve of you jurors agree upon a verdict, you will sign the verdict in ink and advise the bailiff by pressing the buzzer — wait a minute. I missed a part....

* * *

APPENDIX G

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

CASE NO. B854622
(Judge Niehaus)

STATE OF OHIO

Plaintiff,

v.

DAVID J. SCHIEBEL,

Defendant.

ENTRY GRANTING STATE OF OHIO'S
MOTION TO CORRECT THE RECORD AND
CERTIFYING SUPPLEMENTAL RECORD
IN APP. NO. C87-0236

This matter came before the Court on the State of Ohio's motion to correct the record pursuant to App. R. 9(E). After consideration of the memoranda, affidavits and arguments of counsel for the State of Ohio and the defendant, David J. Schiebel, the court finds the motion well taken and hereby certifies a supplemental record in App. No. C87-0236 that shows that the jury instructions presented orally by the trial court after the chambers conference on February 20, 1987 (T.p. 11535-11537, see attached) were delivered in writing to the jury the following day.

The clerk of courts is directed forthwith to certify this entry and supplemental record to the Court of Appeals in App. No. C87-0236, *State of Ohio v. David J. Schiebel.*

SO ORDERED:

/s/
Hon. Richard Niehaus

DATE: June 14, 1989

APPROVED:

/s/

Lawrence A. Kane, Jr.
Special Prosecutor for the State of Ohio
2500 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200

Roger Makley, Esq.
Attorney for David J. Schiebel
Coolidge, Wall, Womsley & Lombard
600 IBM Building
33 W. First Street
Dayton, Ohio 45402

[Attachment:]

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

Court of Appeals Nos. C-870220, C-870222, C-870236

Volume 56

Case No. B-854622

STATE OF OHIO,

Plaintiff,

vs.

MARVIN L. WARNER,
DAVID J. SCHIEBEL,
BURTON M. BONGARD,

Defendants.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that upon the trial of this cause, on November 17, 1986 through March 2, 1987, and March 3O, 1987, before the Honorable Richard A. Niehaus, one of the Judges sitting in the said Court of Common Pleas, the following proceedings were had, to wit:

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On behalf of Defendant David Schiebel:

Roger Makley, Esq.

* * *

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...representation is, that it constitutes an omission, and we think the supreme court says under that instance you're bound to instruct the jury that there is no – that failure to speak in a false representation case is not a crime unless there's a duty to do so, and we've given you the language out of the supreme court decision.

MR. ELLEMAN: Your Honor, I would say you've already instructed with respect to that by saying that you can't disclose part of the truth, but not – without disclosing all of the truth.

THE COURT: What?

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THE COURT: I think it's pretty clear, but it's not going to hurt anything.

MR. MAKLEY: Show me as joining in those objections as well.

(The following proceedings were had in the presence of the jury.)

THE COURT: During argument, you heard considerable discussion as to the motives and actions of other persons. If they acted improperly, charges could be brought against them. The only persons on trial here are the defendants, and the sole purpose of this proceeding is to determine whether or not the defendants are guilty or not guilty. It is not to determine the guilt or innocence of other persons on other charges. However, in weighing the testimony, as the Court has told you before, you may consider their motives as going to the weight of their testimony, but we're only trying the case of these defendants.

Under Ohio law, a savings and loan association may invest any of its funds in bonds or interest bearing obligations of the United States, or for which the faith and credit of the United States are pledged for the payment of principal and interest.

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In counts 83, 85, and 86, in regard to — fraudulent misrepresentation is when an allegation of fraud is based upon no disclosure. There can be no fraud absent a duty to speak by the one charged of engaging in the fraud.

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After you retire, select a foreman or forelady and whenever all twelve – all twelve of the jurors agree upon a verdict, you will sign the verdict in ink and advise the bailiff by pressing the buzzer – wait a minute. I missed a part....

* * *

APPENDIX H

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

No. B-854622

STATE OF OHIO

Plaintiff

-vs-

MARVIN WARNER

Defendant

ENTRY OVERRULING DEFENDANT'S MOTION FOR LEAVE TO FILE MOTION FOR NEW TRIAL UNDER CRIMINAL RULE 33(A)(1) AND (A) (2) FILED PURSUANT TO CRIMINAL RULE 33(B)

Entered January 19, 1988

This matter came before the Court upon the Motion of the Defendant For Leave to File Motion For New Trial Under Criminal Rule 33(A)(1) and (A) (2) Filed Pursuant to Criminal Rule 33 (B).

The Court considered the affidavits filed in this matter, the testimony of witnesses and the arguments of counsel.

The issue in this motion is whether by clear and convincing proof, the defendant was unavoidably prevented from filing his motion for a new trial [under Criminal Rule 33(A)(1) or (A)(2)] within fourteen (14) days as required by Criminal Rule 33(B)?

The Court finds that the defendant has not met his burden. The defendant has failed to prove by clear and convincing evidence that he was unavoidably prevented from filing his motion for a new trial [under Criminal Rule 33 (A)(1) or (A)(2)] within fourteen (14) days.

Therefore the defendant's Motion For Leave to File Motion For New Trial under Criminal Rule 33(A)(1) and (A)(2) and filed pursuant to Criminal Rule 33(B) is overruled.

/s/_____

Robert P. Ruehlman, Judge

APPENDIX I

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

CASE NO. B-854622(C)

STATE OF OHIO

Plaintiff

vs.

DAVID J. SCHIEBEL

Defendant

OPINION OVERRULING DEFENDANT SCHIEBEL'S MOTION FOR A NEW TRIAL

January 20, 1988

This matter came before the Court on the motion of defendant, David J. Schiebel, for a new trial on the grounds of jury misconduct (Civil Rule 33A(2)) and irregularity in the proceedings (Criminal Rule 33A(1)) pursuant to Criminal Rule 33(B).

The Court, after reviewing the transcript of the testimony in a similar motion filed on behalf of co-defendant, Marvin Warner, and the memoranda in support of, and contra to said motion, issues this opinion.

Confronting the Court in the first instance is the question of the timeliness of the motion. A motion pursuant to Rule 33(A) 4, 5 was heard by the Court prior to sentence, and overruled. This motion had been timely filed. The present motion, if it is made on grounds other than newly discovered evidence which, the Court finds it to be, must have been filed within 14 days of the jury verdict. This motion was filed 45 days after the verdict, and is untimely, unless the movant demonstrated by clear and convincing evidence in support of the motion, that he was unavoidably prevented from filing such motion within the prescribed time. If he did not so demonstrate, the motion is time barred.

The Court finds that defendant Schiebel has not shown by clear and convincing evidence that he was unavoidably prevented from timely filing this second motion for a new trial.

As to "jury misconduct" the testimony presented by jurors Brady and Lafkas does not demonstrate any prevention of disclosure of information to the defense lawyers as to the misconduct of *a* juror other than the jurors self-imposed silence. Counsel should be aware of the 14 day rule as to new trial motions under Rule 33, and realize information obtained from jurors after 14 days, regarding misconduct of *the* jury, is by intent of Criminal Rule 33 useless. The intent of the rule is to assure finality and sanctity to a jury verdict. Ohio courts have been in the forefront of jury verdict preservation from the earliest times. Ohio courts authored the "Rule Aliunde" which makes inadmissible remarks or conversations by jurors during deliberations even though they may have been questionable, unless outside evidence of irregularity has been first produced. This assures the secrecy and finality of the jury deliberations and verdicts.

In this cause, there is no evidence presented of *jury misconduct*. Evidence of possible misconduct by a juror, Larry Dalton, who failed to disclose upon voir-dire that his mother-in-law was a depositor in Home State Savings Bank, was presented. (Evidence was also presented that he was unaware of that fact during voir-dire). Defendant argues such evidence is sufficient to show jury misconduct requiring that new trial be ordered. The Court disagrees.

The Court, early on in these proceedings, ruled that Home State depositors or their relatives were prohibited from jury service in the case pursuant to "Criminal Rule 24(B)" which allows a challenge for cause of a juror who is related by consanguinity or affinity within the fifth degree to the person alleged to be injured by the offense charged. This being a case of great notoriety, the Court very liberally construed the rule as a mandated exclusion of such victims or their relatives by blood or marriage, to assure a smoother, less laborious voir-dire process, and to better provide for a fair and impartial jury. This interpretation of the rule was for the defendant's benefit to enable them to choose a fair and impartial jury, and is not necessarily a proper interpretation of the rule. Challenge for an enumerated cause under Rule 24(B) is probably not automatic as it was enforced in this case,

but is more likely subjective. Can the juror be fair and impartial and put aside bias or prejudice? A juror must demonstrate that he or she would not be fair and impartial under his or her circumstances or the circumstances of the case and if they cannot, they should then be excluded.

Rule 33(A)4 requires the demonstration of *jury misconduct* which affected materially and substantially defendants' rights to a fair trial, before a new trial can be granted.

If, as presented in the testimony, it is taken as true that Juror Dalton "hated Marvin Warner" and was related to a "victim" of the crimes charged, does this demonstrate a denial of a fair trial and the rendering of an other than just verdict. The answer has to be "no". All twelve jurors concurred upon the verdicts rendered in the case. It is presumed by law and uncontroverted by an evidence presented on behalf of defendant's motion for a new trial that the verdict was a just one, based solely upon the evidence presented and the law as provided. The fact a juror "hated" one of the defendants, even if true, is not grounds for a new trial. If the verdict was true and just, based on the evidence and law in the case, and a unanimous verdict of all twelve who upon being individually polled announced this to be their true and just verdict, the verdict by law must stand. Although a party to a court proceeding voluntarily would not nor would the law force the choice of a jury of one's enemies because they would be presumed not to be capable of granting justice; if one's enemies are the jury, and that they did justice is all that can be demonstrated, the verdict would stand as a matter of law. The second motion for a new trial is overruled.

A copy of this opinion and corresponding entry have been transmitted to the First District Court of Appeals this 20th day of January, 1988, pursuant to the mandate of their remand of this cause for the Court's decision on the defendant's second motion for a new trial.

/s/

Richard A. Niehaus, Judge

cc: Roger Makley
Lawrence Kane

APPENDIX J

The Supreme Court of Ohio

1990 Term

Case No. 89-584

State of Ohio,

Appellant,

v.

Marvin L. Warner,

Appellee.

ENTRY

November 23, 1990

This cause came on for further consideration upon appellee's filing of a motion for rehearing, motion to stay the mandate pending application for a writ of certiorari to The United States Supreme Court, and motion for reduction of bail. Upon consideration thereof,

The Court finds evidence in the record to clearly support the trial court's order of restitution in the amount of $12,200,000. The record is not as clear as to the additional amount of $9,800,000 restitution set forth in the trial court's order.

IT IS ORDERED by the Court that this issue of restitution be remanded to the trial court for further proceedings, so that if the appellant, State of Ohio, desires to proceed further on this issue of restitution, the parties may be permitted to present further evidence as to any losses which may have occurred as a result of the acts set forth in counts eighty-three, eighty-five and eighty-six of the indictment. This order, in this regard, does not foreclose the State of Ohio from seeking additional remedies against appellee for losses suffered by Home State and its depositors.

IT IS FURTHER ORDERED by the Court that the motion for rehearing in all other respects be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that appellee's motion for stay be, and the same is hereby, granted, and that, provided appellee timely files a petition for writ of certiorari with The United States Supreme Court, this stay shall continue until The United States Supreme Court acts on appellee's petition for writ of certiorari.

IT IS FURTHER ORDERED that appellee's motion for reduction of bail be, and the same is hereby, denied.

(Court of Appeals No. C880072)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX K

The Supreme Court of Ohio

1990 Term

Case No. 90-84

State of Ohio,
Appellant/Cross-Appellee,

v.

Marvin L. Warner,
Appellee/Cross-Appellant.

ENTRY

November 23, 1990

This cause came on for further consideration upon appellee/cross-appellant's filing of a motion for rehearing, motion to stay the mandate pending application for a writ of certiorari to The United States Supreme Court, and motion for reduction of bail. Upon consideration thereof,

The Court finds evidence in the record to clearly support the trial court's order of restitution in the amount of $12,200,000. The record is not as clear as to the additional amount of $9,800,000 restitution set forth in the trial court's order.

IT IS ORDERED by the Court that this issue of restitution be remanded to the trial court for further proceedings, so that if the appellant/cross-appellee, State of Ohio, desires to proceed further on this issue of restitution, the parties may be permitted to present further evidence as to any losses which may have occurred as a result of the acts set forth in counts eighty-three, eighty-five and eighty-six of the indictment. This order, in this regard, does not foreclose the State of Ohio from seeking additional remedies against appellee/cross-appellant for losses suffered by Home State and its depositors.

IT IS FURTHER ORDERED by the Court that the motion for rehearing in all other respects be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that appellee/cross-appellant's motion for stay be, and the same is hereby, granted, and that, provided appellee/cross-appellant timely files a petition for writ of certiorari with The United States Supreme Court, this stay shall continue until The United States Supreme Court acts on appellee/cross-appellant's petition for writ of certiorari.

IT IS FURTHER ORDERED that appellee/cross-appellant's motion for reduction of bail be, and the same is hereby, denied.

(Court of Appeals No. C870222)

/s/

THOMAS J. MOYER
Chief Justice

APPENDIX L

The Supreme Court of Ohio

1990 Term

Case No. 89-583

State of Ohio,

Appellant,

v.

David J. Schiebel,

Appellee.

ENTRY

November 23, 1990

This cause came on for further consideration upon appellee's filing of a motion for rehearing and motion to stay the mandate pending application for a writ of certiorari to The United States Supreme Court. Upon consideration thereof,

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that appellee's motion for stay be, and the same is hereby, granted, and that, provided appellee timely files a petition for writ of certiorari with The United States Supreme Court, this stay shall continue until The United States Supreme Court acts on appellee's petition for writ of certiorari.

(Court of Appeals No. C880102)

/s/

THOMAS J. MOYER
Chief Justice

APPENDIX M

The Supreme Court of Ohio

1990 Term

Case No. 90-85

State of Ohio,
Appellant/Cross-Appellee,

v.

David J. Schiebel,
Appellee/Cross-Appellant.

ENTRY

November 23, 1990

This cause came on for further consideration upon appellee/cross-appellant's filing of a motion for rehearing and motion to stay the mandate pending application for a writ of certiorari to The United States Supreme Court. Upon consideration thereof,

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that appellee/cross-appellant's motion for stay be, and the same is hereby, granted, and that, provided appellee/cross-appellant timely files a petition for writ of certiorari with The United States Supreme Court, this stay shall continue until The United States Supreme Court acts on appellee/cross-appellant's petition for writ of certiorari.

(Court of Appeals No. C870235)

/s/
THOMAS J. MOYER
Chief Justice

(2)

No. 90-1314

Supreme Court, U.S.
FILED
MAR 22 1991
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARVIN L. WARNER and DAVID J. SCHIEBEL,
Petitioners,

v.

STATE OF OHIO,
Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court of the State of Ohio

BRIEF IN OPPOSITION

LAWRENCE A. KANE, JR.
Counsel of Record
SPECIAL PROSECUTOR FOR THE
STATE OF OHIO

MARK A. VANDER LAAN
CARL J. STICH, JR.
KENNETH S. RESNICK
M. GABRIELLE HILS
Assistant Special Prosecutors

1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel for Respondent

Of Counsel:
JEROLD H. ISRAEL
JOHN H. DOYLE, III

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

BEST AVAILABLE COPY

RESTATEMENT OF QUESTIONS PRESENTED

1. Should a state criminal case in which the trial court found from the totality of the surrounding facts that the defendant could receive a fair trial be used as a vehicle to review the practices of those federal courts which rely only upon voir dire to test the availability of an impartial jury?

2. Where a defendant claims error because he was not given copies of written instructions before they were handed to the jury, should the convictions be reversed despite the state court's finding that the written instructions were the same as oral instructions read in the presence of the defendants and that the defendants were not prejudiced by their failure to receive the written copies beforehand?

3. Where a state statute prescribes recklessness as the proper mens rea of an offense, must the State prove that the defendant acted knowingly and intentionally, despite the trial court's admonition prior to trial that such intent was not an element of the crime?

4. May a state criminalize the sale of securities by one who through the exercise of due diligence should know that he is making material misrepresentations to the buyer?

5. Where a jury finds that an accused acted with a purpose to deceive with respect to a course of conduct resulting in multiple securities offenses under state law, may an instruction that allegedly contains a presumption of knowledge be deemed harmless beyond a reasonable doubt based upon the state court's determination that a "purpose to deceive" necessarily implies actual knowledge?

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No. 90-1314

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARVIN L. WARNER and DAVID J. SCHIEBEL,
Petitioners,

v.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

OPINIONS BELOW

Respondent does not contest the statement of opinions below set forth in the Petition for Writ of Certiorari. For the convenience of the Court, citations to the opinions below will be to the text of those opinions reproduced in the appendix to the Petition for Writ of Certiorari.

JURISDICTION

Respondent does not contest petitioners' statement that they are seeking to invoke jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS

Respondent does not contest the recital of statutory provisions set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Home State Savings Bank collapsed in March 1985 because over $144 million of its assets illegally transferred to ESM Government Securities, Inc. were lost when ESM went bankrupt. ESM was unquestionably a fraud. In Home State it found an owner and officers willing to risk millions of dollars of other people's money, heedless of board resolutions and regulatory instructions specifically to the contrary. Just months before Home State's insolvency became public, its owner (petitioner Warner) and president (petitioner Schiebel) engineered the sale to an unwitting public of millions of dollars in worthless debentures.

1. *The Trial*

On December 13, 1985, petitioners Warner and Schiebel were each indicted by a state grand jury for forty-one counts of misapplication of funds, forty-one counts of unauthorized acts, and three counts of securities violations, all felonies under Ohio law. A co-defendant, Burton Bongard, — a predecessor of Schiebel as president — was indicted on all but the securities counts. Trial was initially scheduled for August 18, 1986 but was continued at the defendants' request until November 17, 1986 — some twenty months after Home State's collapse.[1]

With the depositors no longer anxious about their funds,

---

[1] The failure of Home State led the Ohio Governor to briefly close the other privately-insured savings and loans. By the time of trial, those savings and loans had been re-opened for more than a year, without loss to depositors.

local interest abated. The defendants nonetheless requested a change of venue based upon media coverage attending Home State's collapse and the flawed results of two outdated surveys commissioned by Warner.[2] Having reviewed all of this material, the trial judge elected to withhold his ruling on venue until the conclusion of voir dire. The judge did, however, grant several defense requests regarding the procedures for jury selection. Most notably, each potential juror completed a specially prepared questionnaire and was individually questioned outside the presence of the other veniremen. At the conclusion of voir dire, the trial judge specifically found that a fair jury had been found within Hamilton County.[3]

After a three month trial and nine days of deliberations, the jury rendered a verdict which carefully delineated the defendants' culpability. Bongard was convicted of all eighty-two misapplication and unauthorized acts counts; Warner was convicted of six unauthorized acts counts pertaining to

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[2] What petitioners characterize as "professional opinion polls" were conducted for Warner by the "National Jury Project." In its book, *Jurywork: Systematic Techniques* ix (2d ed. 1984), that organization describes itself as "one of the few such organizations devoting its efforts to civil plaintiffs and criminal defendants," and gives "how-to" methodologies for arguing for a change of venue. An expert described Warner's surveys as "fatally flawed" and "scientifically invalid as accurate gauges of current public opinion concerning the defendants in this case." The more recent of the two surveys was seven months old when trial began.

[3] The Petition for Certiorari is replete with hyperbole, mischaracterizations, and matters not included in the record. Typical is the misleading remark that the trial "was filmed for television." (Pet., p. 4.) As in countless other cases, cameras were allowed in the courtroom subject to compliance with guidelines contained in state and local court rules, and trial excerpts were sometimes shown during local news broadcasts. Defendants never objected. Elsewhere, petitioners aver that Warner was acquitted of federal charges "based on the same conduct involved in this case." (Pet., p. 5.) To the contrary, all but two of the eighteen counts against Warner in the federal indictment involved conduct for which Ohio did not indict under any law. Furthermore, the federal charges were for conspiracy and wire fraud, not for unauthorized acts or securities violations. *United States v. Warner, et al.*, No. CR 1 86-0106 (U.S.D.C., S.D. Ohio).

transactions occurring after he became directly involved in transfers made to ESM; and both Warner and Schiebel were convicted of the three securities counts.[4] The trial court sentenced Warner to ten-and-a-half years imprisonment, seven of which were suspended. Schiebel was sentenced to eighteen months, with twelve months suspended.

2. *The Unauthorized Acts Offenses*

Home State was a state-chartered savings and loan association headquartered in Cincinnati, Ohio, and regulated by the Ohio Division of Savings and Loan Associations ("ODLSA") and the Ohio Deposit Guarantee Fund ("ODGF"), the private insurance fund to which Home State belonged. Beginning in the early 1980's, Home State lost millions of dollars from its traditional residential financing operations. To produce profits, Home State turned to ESM, a small, unregulated and thinly-capitalized government securities dealer in Fort Lauderdale, Florida. ESM and Home State developed a mutual dependence. Through unorthodox repurchase agreements ("repos"), Home State gave ESM the free use of securities valued in the millions, which ESM used as collateral for loans from other customers.[5] In exchange, ESM gave Home State a steady cash flow through rigged "day trades."

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[4] Bongard dismissed his appeal, and has completed his state prison term. The separately-indicted officers of ESM and a partner of Alexander Grant — the accounting firm which certified false ESM financials — pled guilty to numerous Ohio offenses months before the defendants' trial, and have also been imprisoned.

[5] Although repurchase transactions are couched in terms of a "purchase" and "sale" of securities, they are the equivalent of collateralized loans. In a repo, ESM borrowed a municipality's excess funds by selling it government securities, subject to a promise to later repurchase these securities at a price profitable to the municipality. On the other side, ESM simultaneously lent the municipality's funds on a short term basis by purchasing the government securities (which were being sold by ESM to the municipality) from an institution such as a bank or savings and loan, subject to ESM's promise to later resell the securities to the institution at a profit to ESM.

Perhaps more importantly, ESM maintained personal accounts through which petitioner Warner and his co-defendant Bongard received millions of dollars in similarly rigged transactions.

The fatal relationship between Home State and ESM began in 1980, when Home State first entered into a series of extremely large and irregular repurchase transactions with ESM labelled "leveraged arbitrages." The most dangerous irregularity in these repos was the exceedingly large amount of collateral Home State gave to ESM in relation to the amount Home State borrowed from ESM. According to industry standards, the accepted collaterization rate, i.e., the market value of collateral given in relation to the amount borrowed, for repurchase transactions is no more than 105% to 110%, depending on the type of security. Between 1980 and 1983 the collateralization rates for Home State's repos were as high as 239%. In return for this massive overcollateralization, ESM gave Home State profits derived from fictitious "day trades" to offset losses from Home State's normal lending operations. The ultimate price of this illicit cash flow, however, was enormous — overcollateralization was the equivalent of an interest-free, unsecured loan from Home State to ESM, creating a risk of massive loss for Home State should ESM not return the collateral.

The unprecedented financial risk created by Home State's transactions with ESM was the subject of regulatory comment and concern for several years preceding Home State's collapse. The ODSLA concluded that the income generated by these transactions did not justify the tremendous risk to Home State, its depositors, and the ODGF. The ODGF concurred in ODSLA's conclusions and, beginning in 1982, issued a series of written directives instructing Home State to reduce its involvement with ESM. On April 28, 1983, at the insistence of ODGF, the Home State board of directors passed a resolution expressly limiting the collateralization rates to 105% and 110%. This resolution was never modified or rescinded.

Warner admitted at trial that he received copies of the board reports. Although not a board member, he stayed in close contact with Home State's management, and little of consequence could be done without his blessing or knowledge. On April 13, 1983 — while ODGF's demand for the board resolution was pending — Warner personally authorized Home State's largest transaction with ESM — a $700 million leveraged arbitrage. The ODSLA and ODGF directives regarding collateralization levels were discussed at the meeting in which Warner gave his authorization. The board of directors — which thought Home State was *reducing* its involvement with ESM — never approved this massive transaction. Shortly after the leveraged arbitrage was in place, ESM began calling upon Home State to send additional funds in the guise of "margin calls."[6] The series of payments Home State made to ESM in 1983 were not legitimate margin calls, as they bore no rational relationship to the change in market value of Home State's securities pledged to ESM, and greatly exceeded the 105% and 110% limits of collateralization adopted by the board resolution.

Between May 1983 and October 1983, Home State made forty-one payments to ESM, each of which violated the April 1983 board resolution and created a greater risk of loss for Home State. Home State's unauthorized transfers to ESM during this period totalled $114 million, and constitute the lion's share of Home State's losses at the time of its collapse in March of 1985. The jury convicted Warner for the last six transfers (totalling $12 million), which took place after Warner had specifically assumed final responsibility for future Home State payments to ESM.

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[6] Margin calls are used by securities dealers and customers to adjust the collateralization rate in response to changes in the market value of collateral. For example, if the market value of the collateral declines, the dealer will call for additional funds from the customer to maintain the previous level of collateralization. However, if the market value of the collateral increases, the customer will make a margin call upon the dealer. Home State did not make margin calls on ESM.

Warner's personal account at ESM fared far better than Home State's. Warner's account was relatively inactive until Home State's involvement with ESM increased by hundreds of millions of dollars. Between 1980 and 1985, Warner was given approximately $9 million by ESM through fictitious "day trades," interest rate subsidies, rebates and the early close-out of his personal account. Upon learning in early 1985 that ESM was on the verge of collapse, Warner demanded that ESM cash out his personal account. Within a week, Warner received all of his funds from ESM, including a $385,990 gain. ESM closed the next month, unable to return Home State's collateral.

3. *The Securities Offenses*

In 1984, Warner and Schiebel engineered another scheme designed to keep Home State artificially afloat. Home State's parent company, Home State Financial, Inc. ("HSFI"), needed $29 million to retire debentures due to mature on October 31, 1984. HSFI lacked liquid assets, so it planned to simply issue new debentures. In January 1984 HSFI filed a 156-page S-2 registration statement to obtain the approval of the SEC.

The registration approval process — which was expected to last only 45 days — became an eight month ordeal of unrelenting questioning by the SEC about Home State's transactions with ESM. By late August, with only two months left before the debentures matured, SEC approval appeared hopeless. Warner and Schiebel therefore implemented an alternative plan — the merger of HSFI into Home State, thereby making Home State's deposits available to pay off the debenture debt. Home State could issue the new debentures without SEC scrutiny because, as a "bank," it would be exempt from the registration process.

Warner and Schiebel obtained a remarkably expedited approval of the merger from both the ODSLA and ODGF by

never mentioning to them the pending S-2 or the SEC's troublesome questions about Home State's ESM transactions. Following the merger, Home State proceeded to issue new debentures by use of a four page offering circular which incorporated by reference (but did not attach) HSFI's prior 10-K and 10-Q filings, which had been signed by Schiebel. The offering circular contained a general description of the debentures and two pages of unaudited financial statements. Neither Home State's attorneys nor its auditors ever issued an opinion on the circular's contents or the financial statements. Warner and Schiebel were actively involved in the preparation of the offering circular,[7] reviewing and revising it until it was mailed on Friday, September 28, 1984. Even though Home State had become a financial hostage to ESM, Warner and Schiebel omitted *any* reference to ESM in the circular.[8]

Home State's assets were grossly overvalued in the financial statements contained in the offering circular. Proper disclosure of one asset alone would have wiped out the reported net worth and revealed that Home State was insolvent. There were also blatant misrepresentations in the 10-K and 10-Q reports which were incorporated by reference into the offering circular. Warner and Schiebel participated in the sale of the debentures with full knowledge that the offering circular grossly distorted Home State's true financial condition. They worked together to set up the sales team, develop

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[7] Both petitioners are sophisticated businessmen with considerable experience in securities offerings and knowledge of disclosure requirements. Additionally, Warner has a masters of law degree, and Schiebel is a certified public accountant.

[8] ESM's financial troubles were emphasized to Warner and Schiebel at a meeting at Home State on September 26, 1984 — just two days before the offering circular was mailed. ESM's principals told Warner and Schiebel that it could not return Home State's collateral; it could not substitute collateral; it could not unwind the transactions; and, in short, ESM did not have the money. At the time of this meeting, petitioners had no idea where Home State's collateral, worth far in excess of the institution's net worth, was located.

leads, and direct the sales effort. Schiebel personally conducted training sessions and revised the training manual.

4. *The Jury Instructions and Verdict*

The State and petitioners submitted to the trial court exhaustive memoranda on proposed jury instructions. While discussing proposed jury instructions regarding the unauthorized acts counts during the week before trial, the trial court cautioned that, "I'm very reluctant to add something that is not contained in the statute as an element of a crime." (T.p. 102.) The trial judge then advised the parties that he believed the mens rea for unauthorized acts counts was different from that for misapplication counts. From that point forward, the defendants were on notice that the jury instructions on the unauthorized acts counts would not include the knowledge or intent mens rea of the misapplication counts. As the Ohio Supreme Court held, the charges given by the court accurately state the law of Ohio.

In its charging conference, the trial court spent a considerable amount of time explaining to counsel the instructions the court intended to give to the jury, but — in accordance with its usual practice — did not give written copies of the charge to the prosecution or defense in advance of closing argument. The trial court gave defense counsel a virtually unlimited opportunity to argue and ask questions about the proposed instructions.

After reading its written set of instructions to the jury, the trial court held a chambers conference with counsel to hear objections and requests for additional charges. Following this conference, in the presence of all defendants and counsel, the judge gave the jury four additional instructions. All but one of these supplemental instructions had been requested by the defense, and all were given without further objection. As the jury retired to deliberate late that afternoon, it was provided with a copy of the court's previously prepared written set of instructions.

Early the next morning, counsel for petitioner Warner — acting on behalf of all three defendants — met with an assistant special prosecutor and arranged to have the supplemental instructions typed. They were then brought to the trial judge who gave them to his constable for delivery to the jury room. No defendant objected to this procedure, nor was there any request that the jury be recalled for a formal presentation of the additional written instructions in open court.

The jury deliberated for nine days, then rendered a verdict reflecting a careful study of the evidence. Within the fourteen day limit imposed by Ohio rules, the defendants moved for a new trial or acquittal. All motions were denied, and the defendants were sentenced.

5. *The Post-Trial Proceedings*

Well after the time for filing new trial motions had passed, Warner's wife, an attorney, spent eight hours with Juror John Brady during two sessions at a local restaurant and "a couple hours" at the house of Juror Rita Lafkas, all supposedly as "trial preparation" for the upcoming federal case. (Both jurors had been previously contacted within fourteen days of the verdict by Warner's lawyers.) Having thus been courted by the wife of the man they voted to convict, the two agreed to sign affidavits attacking Juror Larry Dalton.[9] The defendants then filed the affidavits in support of requests for leave

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[9] Petitioners imply that Dalton lied his way onto the jury by concealing that his mother-in-law once had an account at Home State, yet *all* of the evidence — including the juror affidavits — establishes that Dalton was unaware of the account at the time of voir dire. The account had been effectively closed months before Home State collapsed, remaining technically open only because *twenty cents* in accrued interest was credited after all deposits had been withdrawn. Petitioners further proffered the affidavit of Juror Lafkas to say that Dalton told her he "hated" Marvin Warner. Dalton explained in an affidavit that he took to "needling and kidding" Lafkas during the three month trial, and made jesting remarks to "get a rise out of her," but not out of any dislike for Warner.

to file untimely new trial motions. The proposed motions for new trial were based upon the two juror affidavits, thus violating the Ohio evidence rule which forbids the use of juror testimony to attack verdicts. Ohio R. Evid. 606(B). The trial court denied the requests on the basis that they were untimely under Ohio law.

The defendants had appealed their convictions immediately after sentencing. They each filed a second appeal after their untimely new trial motions were refused. Each defendant's two appeals were at first consolidated by the court of appeals, so the defendants each filed just one brief relating to both of their appeals. In those briefs — filed almost fifteen months after the verdict — defendants for the first time alleged that the jury never received written copies of the supplemental instructions typed at their request on the first morning of deliberations. Before the State could investigate and respond, the court of appeals reversed its order of consolidation, stayed the conviction appeal (in which this "missing instruction" argument arose), and ordered the State to brief only the new trial issue.

After the stay of the conviction appeal was lifted, the State moved under Ohio App. R. 9(E) to correct the record as to the allegedly "missing" instructions. The trial court found as a matter of fact that the supplemental instructions had been delivered to the jury. The Ohio Supreme Court upheld that finding.

REASONS FOR DENYING THE WRIT

A unanimous Ohio Supreme Court affirmed petitioners' convictions after a careful review of a record containing 11,880 transcript pages, hundreds of trial exhibits, affidavits, and memoranda. The petitioners are now asking this Court to revisit that record, make new findings of fact, and establish unprecedented constitutional barriers to state prosecutions of illegal practices in the savings and loan industry. Despite the petitioners' inflated rhetoric, there is no legitimate constitutional reason for the Court to review this case.

The venue decision presents no constitutional question, as Ohio follows the venue standards and procedures mandated by this Court. Venue was determined only after the trial court made a factual finding that the defendants could get a fair trial without a change of venue. Thus, a review by this Court would consist of a reappraisal of the record to determine whether or not the trial court misread the atmosphere in Hamilton County on the eve of trial. The issues relating to jury instructions likewise depend upon the facts: whether or not supplemental instructions reached the jury, and whether or not the oral instructions varied from the written. Those findings of fact are then meaningful only through application of state law. Ohio's highest court found that the jury received the proper instructions — in fact, and as required by law.

To justify review of the securities counts, the Court must find a constitutional basis for denying Ohio the right to define what constitutes criminal conduct in the sale of securities and be willing to override the jury's findings as to the petitioners' mental state. To warrant review of the unauthorized acts counts, the Court would need to assume that the Ohio Supreme Court erroneously interpreted its prior decisions and Ohio's unauthorized acts statute, or else decide that a jury should be wrongly instructed in order to meet a defendant's unjustified hopes.

The petitioners were convicted because their conduct, not their trial, was unlawful. The unanimous Ohio Supreme

Court was unconvinced that squandering depositors' funds and selling worthless debentures are permitted conduct in Ohio, or that the jury and trial court misjudged the facts. Petitioners' convictions give rise to no constitutional issue.

1. The Ohio Courts Applied The Venue Test Set Forth By This Court In *Irvin* v. *Dowd*, And The "Totality Of The Surrounding Facts" Showed That The Defendants Could Receive A Fair Trial Without A Change Of Venue.

The jury in this case produced a verdict which could only result from a dispassionate study of the evidence. Unable to legitimately attack the jury's performance, petitioners urge certiorari to clarify a federal practice of "exclusive reliance upon voir dire" to resolve venue motions. (Pet., pp. 24, 26.) Whether or not the petitioners have accurately characterized the federal venue practice is academic, because Ohio relies upon "the totality of the surrounding facts" to assess fairness, as prescribed by this Court in *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961). (Pet. App. A, pp. 22-23.) The present case is the wrong vehicle through which to test the federal practice of "exclusive reliance on voir dire" cited by the petitioners.[10]

The totality of the surrounding facts reveals that defendants received a fair trial. The trial court had before it all of the newspaper clippings, media accounts, and privately-commissioned surveys submitted by the defendants. A review of those materials, however, did not in the court's opinion mandate a change of venue. Even the petitioners' exaggerated

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[10] If federal courts are applying incorrect standards, then the problem should not be addressed in a state case, where the federal standard may be inapplicable. The Court may choose to adopt a rule "[i]n exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in federal courts, and not as a matter of constitutional compulsion." *Murphy* v. *Florida*, 421 U.S. 794, 797 (1975), quoting *Marshall* v. *United States*, 360 U.S. 310, 313 (1959). In *Murphy*, for example, the Court refused to apply the more stringent federal standard of *Marshall* to state criminal proceedings.

depiction of the mood in Hamilton County does not indicate a "trial atmosphere . . . utterly corrupted by press coverage," so as to require a change of venue.[11] *Dobbert* v. *Florida*, 432 U.S. 282, 303 (1977). The trial court nevertheless granted the defendants a continuance — suggested in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), as one means of alleviating any potential for local prejudice — thus jury selection did not begin until eleven months after petitioners were indicted, and twenty months after the fall of Home State. "That time soothes and erases is a perfectly natural phenomenon, familiar to all." *Patton* v. *Yount*, 467 U.S. 1025, 1034 (1984).

Under these circumstances, the trial court correctly withheld ruling on the defendants' motion for change of venue until the conclusion of voir dire. Potential jurors filled out special questionnaires testing their background and knowledge of the case. Home State depositors, debentureholders, and their relatives were automatically disqualified, even though none of them had lost their funds.[12] Each venireman was then individually questioned outside the

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[11] Even at its height, the media coverage was factual and non-inflammatory. Much of the publicity focused upon the wrongdoings of ESM and Alexander Grant, whom the defendants publicly and at trial blamed for Home State's collapse. The petitioners are asking the Court to do what it refused to do in *Dobbert* — presume prejudice simply because the community was made aware of the charges against them.

[12] Petitioners also requested that depositors at all other ODGF-insured institutions be automatically disqualified as "victims." This Court has previously refused to categorically disqualify jurors for implied bias. *E.g.*, *Dennis* v. *United States*, 339 U.S. 162 (1950) (federal employees not automatically disqualified in "loyalty oath" case). No reported case has ever defined "victim" so broadly as to include depositors (or even shareholders) of an institution which was not the target of a defendant's crimes. The State could uncover only one instance where a defendant had even attempted such a bold argument. *United States* v. *Gleason*, 616 F.2d 2 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980) (bank depositors not automatically disqualified from bank fraud prosecution). The circuit court characterized the defendants' argument as "so speculative as to border on the frivolous." *Id.* at 21.

presence of the others. The trial judge ultimately observed that "we have engaged in extensive and comprehensive voir dire over the last two weeks or more, subjecting some seventy jurors to one and a half to two and a quarter hours of questioning, sometimes resembling a rigorous cross-examination rather than voir dire" and expressly found that "the passage of time has reduced the effect of pretrial publicity" and that a fair and impartial panel had been found within Hamilton County. (T.p. 2850-51; Pet. App. A, pp. 24-25.) That finding should be accorded "special deference." *Patton* v. *Yount*, 467 U.S. at 1036-37. Three Ohio courts found the jury to be fair, and the petitioners can point to nothing from the record to prove otherwise.

Petitioners instead resort to irrelevancies and innuendo, none of which bears upon the issue they want reviewed. They refer to Warner's acquittal of federal wire fraud charges in Michigan, ignoring that the Ohio jury convicted on charges having no counterpart in the federal trial (unauthorized acts and securities violations).[13] They then launch an unjustified attack on two of the jurors.

Petitioners impugn Juror Beth Statt because her account at an ODGF thrift was briefly frozen. Statt's individual voir dire consumes eighty-four pages of the trial transcript. (T.p. 2763-2847.) None of the three teams of defense attorneys — all with foreknowledge of Statt's background — moved to strike her for cause based upon her testimony. All three rested upon their categorical objection to depositors at ODGF-insured institutions. The trial court expressly found that Statt's "answers to the questions did not indicate any bias or prejudice." (T.p. 2849.)

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[13] The federal trial took place just weeks after defendants' convictions in this case were reported in the Cincinnati news media. A change of venue in the federal case was ordered by a visiting judge who elected to move the case to his own district in Michigan. Moreover, the federal indictment and trial proceedings are *not* part of the record in this case.

The unprincipled attack upon Juror Larry Dalton is even more outrageous, and exemplifies the evils of inviting defeated litigants to beseige jurors "in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *McDonald* v. *Pless*, 238 U.S. 264, 267-68 (1915); *see Tanner* v. *United States*, 483 U.S. 107 ("[s]ubstantial policy considerations support the rule against the admission of juror testimony to impeach a verdict"). As the Ohio Supreme Court held, the defendants' request to file an untimely new trial motion attacking Dalton through dubious juror affidavits was properly denied under Ohio law, and is supported by adequate state grounds. (Pet. App. B, pp. 5-9.) The rejected new trial motions are irrelevant to the venue and voir dire issues.

This case offers no venue, voir dire, or other issue worthy of review. Petitioners received every constitutional safeguard necessary to assure them a fair trial by an impartial jury. The lower courts' findings to that effect should be respected.

2. The Ohio Supreme Court Properly Applied The Harmless Error Standard To All Issues Concerning The Presentation Of Instructions To The Jury.

Petitioners' argument regarding the Ohio Supreme Court's analysis of the jury instructions is premised upon a highly misleading characterization of the facts. At the heart of petitioners' argument are two separate events. The first relates to four additional instructions delivered orally at the end of the charge, then reduced to writing and delivered to the jury the morning of the first full day of deliberations. Petitioners do not assert that these additional instructions were erroneous — indeed, they had requested three of the four. Rather, they object to the *procedure* used to get them in writing to the jury, although Warner's counsel was directly involved in that very procedure. Specifically addressing Warner's argument, the Ohio Supreme Court stated:

> We note with respect to the ex parte communications that Warner's attorneys were present when the trial judge left his chambers to order the additional instructions given to the jury. Warner does not assert, nor does the record indicate, that he objected to the trial court about this procedure or that a request was made that the jury be recalled for a formal presentation of the additional written instructions in open court.

(Pet. App. A, p. 41.)[14] Thus, as to these additional instructions, Warner's attorneys saw them in advance, assisted in their preparation and delivery, and made no objection to the procedure.

Petitioners then complain that the State's motion to correct the record to reflect delivery to the jury of the written instructions was "belated."[15] The State did not file the motion earlier because the petitioners failed to raise any issue about the additional instructions until their appellate briefs were filed fifteen months after the verdict. The correction of the record was addressed through hearings in the trial court, which factually determined that the additional instructions got to the jury. The Ohio Supreme Court upheld that finding. (Pet. App. A, p. 41.)

As to petitioner Schiebel, the Ohio Supreme Court held that "Schiebel's absence when the [written] supplemental instructions were delivered was harmless beyond a reasonable doubt." (Pet. App. B, p. 33.) The trial court had done no

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[14] As with other housekeeping matters throughout the case, it was clear to the State and the trial judge that Warner's attorneys were present for this purpose on behalf of all three defendants.

[15] Petitioners also contend that the motion was "controversial," even though it is clearly provided for in Ohio App. R. 9(E), which is identical to Fed. R. App. P. 10(e). The only "controversy" arose because Warner initially attempted to argue that his attorneys were oblivious to the additional instructions when, in fact, they were directly involved in the process.

more than supply the jury with written versions of instructions — most given at defendants' request — which had already been read to the jury in the presence of all parties and counsel. Based upon its review of the record, the Ohio Supreme Court found that Schiebel's "presence or absence would not have changed the outcome of the verdict given the substantial amount of evidence in support of conviction." (Pet. App. B, p. 33.)[16]

The second event about which petitioners complain was the trial court's decision not to supply the prosecution or defense with a copy of the written instructions prior to their submission to the jury. The Ohio Supreme Court found "no prejudice from the inability of defendants to inspect the written instructions." (Pet. App. B, p. 23.) The petitioners' effort to overcome this crucial flaw in their argument is a contention that there were five alleged minor variations between the 221 pages of written instructions and the seventy-one transcript pages of oral instructions. (T.p. 11,458-11,524, 11,535-11,539.) The Ohio Supreme Court properly characterized petitioner Warner's arguments about the alleged variations as "meritless." (Pet. App. A, p. 41.)[17] Moreover, as this Court has noted, an instruction cannot be

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[16] Throughout the Ohio Supreme Court's opinions regarding Warner and Schiebel, the unanimous court evinced a firm and coherent understanding of the harmless error standard set forth in *Chapman* v. *California*, 386 U.S. 18 (1962), and further clarified in cases such as *Rushen* v. *Spain*, 464 U.S. 114 (1983); *Rose* v. *Clark*, 478 U.S. 570 (1986); and *Carella* v. *California*, 491 U.S. 263 (1989).

[17] Two of the alleged "variations" relate to the absence of a written instruction that a "good purpose" could be a defense to the unauthorized act counts (on which only Warner was convicted), but the Ohio Supreme Court held that a good purpose or motive was *not* a defense to such charges. (Pet. App. A, p. 41 n. 19.)

Petitioners then complain about surplus wording in an introductory explanation of the unauthorized acts statute. However, in the *specific* charges on those counts, the allegedly surplus words ("warrant or other order") were not used. Petitioners also mistakenly allege that there is a difference be-

judged in artificial isolation from the remainder of the charge. *Cupp* v. *Naughton*, 414 U.S. 141, 147 (1973). That is all the more obvious in a charge of this length.

Ohio's highest court having found that there were no meaningful variations between the oral and written instructions, the petitioners have no valid basis upon which to invoke federal review.

3. A Defendant Who Is Advised By The Court Prior To Trial That The Offense For Which He Was Indicted Does Not Require Proof Of Specific Intent And Who Is Neither Misled Nor Prejudiced Does Not Raise Any Due Process Issue.

Warner asserts that the Ohio Supreme Court in *State* v. *Keith*, 91 Ohio St. 132, 110 N.E. 188 (1914) and *Peskind* v. *State*, 115 Ohio St. 279, 152 N.E. 670 (1926) had long ago interpreted the unauthorized acts offense to require proof of an intent to injure or defraud, despite the fact that such an intent did not appear in the language of the offense. Ohio Rev. Code § 1153.01. This faulty rendition of state law — upon which Warner's due process claim under *Marks* v. *United States*, 430 U.S. 188 (1977), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), depends — was rejected by Ohio's Supreme Court and Court of Appeals.[18] Thus, Warner was neither convicted of a crime "not enumerated in the statute"

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tween the statutory definition of reckless in the transcript (T.p. 11,480) and that in the written instructions (T.d. 415 at 13, 28), but there is no actual variation. The standard is properly articulated in each place.

Finally, referring to one preliminary written instruction describing the "due diligence" requirement of Ohio's securities laws, petitioners argue that the court somehow shifted the burden of proof. Petitioners take the statutory definition totally out of context and ignore the trial court's clear instructions that the State was required to prove all elements of such offenses beyond a reasonable doubt. (T.p. 11,500; T.d. 415 at 3, 197-203.)

[18] The court of appeals found "that the cases cited by Warner in support of his contention that intent to injure or defraud as a judicially-imposed ele-

at the time of his conduct, *Bouie*, 378 U.S. at 363, nor was he confronted with a retroactive application of an unforeseeable judicial enlargement of the unauthorized acts offense, *Marks*, 430 U.S. at 192.[19] Contrary to Warner's assertion, the trial court's recklessness instruction and the reviewing courts' affirmance of this instruction were not a "marked departure" from prior state law, but were consistent with the Ohio default statute imposing recklessness as the mens rea where a criminal statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability." Ohio Rev. Code § 2901.21(B); *see also Osborne* v. *Ohio*, ____ U.S. ____, 110 S. Ct. 1691, 1698 n. 9 (1990) (applying Ohio Rev. Code § 2901.21(B) to criminal statute silent on mental state).[20]

Nor does Warner have any due process claim under *Jackson* v. *Virginia*, 443 U.S. 307 (1979), or *DeJonge* v. *Oregon*, 299 U.S. 353 (1937). The trial judge did not, as Warner asserts, either "manipulate" or "switch" the mens rea charge with respect to the unauthorized acts. Before the trial commenced,

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ment have no application to the portion of R.C. § 1153.01 describing unauthorized acts. *See Peskind* v. *State* (1926), 115 Ohio St. 279, 152 N.E. 670; *State* v. *Keith* (1914), 91 Ohio St. 132, 110 N.E. 188." (Pet. App. C, p. 32.)

[19] Moreover, the state law construction of the unauthorized acts offense involved in this case does not threaten any constitutionally protected rights. *See, e.g., Marks*, 430 U.S. at 197 (expression); *Colautti* v. *Franklin*, 439 U.S. 379 (1979) (privacy).

[20] Not all federal courts have read an "intent to injure or defraud" into the federal unauthorized acts offense, as Warner contends. *See, e.g., Harrison* v. *United States*, 279 F.2d 19 (5th Cir. 1960). Even under the federal misapplication statute, the mental element may be satisfied by a showing of recklessness. *United States* v. *Woods*, 877 F.2d 477 (6th Cir. 1989); *United States* v. *Cyr*, 712 F.2d 729 (1st Cir. 1983). More relevant to this case, however, is the fact that other states beside Ohio have refused to read an "intent to injure or defraud" into their unauthorized acts or misapplication offenses where such an intent did not appear in the statute. *Commonwealth* v. *Nichols*, 257 Mass. 289, 153 N.E. 787 (1926); *People* v. *Marcus*, 261 N.Y. 268, 185 N.E. 97 (1933).

the judge made it clear that under Ohio law an intent to injure or defraud was not an element of the unauthorized acts offense and likewise expressed his reluctance to add a mens rea that was not contained in the statute as an element of the crime. Warner did object to the recklessness charge as a matter of Ohio law, but he did not — and could not legitimately — claim that he was surprised, prejudiced or otherwise taken unawares by this charge.[21]

Finally, there was more than sufficient evidence from which the jury could have concluded beyond a reasonable doubt that Warner was aware of the board of directors resolution limiting Home State's collateralization rate with ESM. Warner received copies of the board reports, attended board meetings, and was fully briefed by Home State's officers regarding the extent of Home State's excessive collateralization of its transactions with ESM. Indeed, as the Ohio Supreme Court noted after reviewing the entire record, "Warner was involved in almost every facet of the internal operations of the bank," and "he was kept informed of all policy decisions of the Board." (Pet. App. A, p. 40.) It is

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[21] In this respect, Warner's reliance on *Watson* v. *Jago*, 558 F.2d 330 (6th Cir. 1977), is erroneous. In *Watson*, the issue was "whether under the facts of this case, felony-murder was effectively added to the charges against which appellant had to defend." 558 F.2d at 335. The court found that the addition of a felony-murder charge at the time of opening statements clearly constituted an impermissible amendment of the indictment under state law. This state law error became the predicate for federal relief under the due process clause because the amendment added an independent basis for conviction for which defendant was not given any notice prior to trial. In contrast to *Watson*, no impermissible amendment of the indictment occurred here, nor was the indictment defective under state or federal law for misstating the appropriate mens rea. *State* v. *O'Brien*, 30 Ohio St. 3d 122, 508 N.E.2d 144 (1987); *United States* v. *Haas*, 583 F.2d 216 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). As the Ohio Supreme Court noted below, it is not necessary "to set forth a specific degree of culpability in an indictment where the statute fails to do so and it can readily be gleaned by reference to other statutes or case law." (Pet. App. A, p. 49.)

Warner's spurious disavowal of knowledge — not the State's evidence — that "falls short" in this case.

4. A State May Define The Mental Element Of A Securities Offense In Terms Of Due Diligence Without Violating The Due Process Clause.

For purposes of its criminal securities offenses, Ohio has chosen to define the mental element of knowledge in terms of due diligence:

> In any prosecution brought under §§ 1707.01 to 1707.45 of the Revised Code, . . . the accused shall be deemed to have had knowledge of any matter of fact, wherein the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge.

Ohio Rev. Code § 1707.29. The Ohio legislature specifically intended this definition of knowledge to be used exclusively in prosecutions for the securities offenses set forth in Chapter 1707 of the Ohio Rev. Code, including Ohio Rev. Code §§ 1707.44(B), (G) and (J), of which petitioners stand convicted.

The Ohio legislature's decision to impose criminal liability for these securities offenses based upon a due diligence standard presents no federal constitutional issue. "There is wide latitude in lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." *Lambert* v. *California*, 355 U.S. 225, 228 (1957). This is particularly true of regulatory statutes enacted to achieve legitimate social ends pursuant to a state's police powers. *United States* v. *Freed*, 401 U.S. 601, 609 (1971); *United States* v. *Balint*, 258 U.S. 250, 252 (1921). In short, there is no question that Ohio Rev. Code § 1707.29 is a constitutional exercise of Ohio's police powers.

Petitioners seek to avoid this truth by mischaracterizing Ohio Rev. Code § 1707.29 as a mandatory irrebuttable pre-

sumption that relieved the prosecution of its burden of proof on an essential element of the offense in violation of the Due Process Clause. *See Sandstrom* v. *Montana*, 442 U.S. 510 (1979). In support of this proposition, petitioners call attention to the label ("Presumption of Knowledge") affixed to Ohio Rev. Code § 1707.29 by the codifiers. The title, chapter and section headings of the Revised Code, however, do not constitute any part of Ohio law. Ohio Rev. Code § 1.01. In interpreting Ohio law, a "resort to a title is unnecessary and improper under Revised Code Section 1.01." *State* v. *Beener*, 54 Ohio App. 2d 14, 16, 374 N.E.2d 435, 436 (1977).

Every Ohio court to have considered Ohio Rev. Code § 1707.29 has declared the statute to be the definition of knowledge for purposes of the security law offenses contained in Title 17 of the Revised Code and *not* an impermissible presumption. *State* v. *Trivedi*, 8 Ohio App. 3d 412, 457 N.E.2d 868 (1982); *State* v. *Walsh*, 66 Ohio App. 2d 85, 420 N.E.2d 1013 (1979). The Ohio Supreme Court has interpreted "the legislative intent of R.C. 1707.29 to, in effect, define the knowledge requirement for certain violations of Ohio's Securities Act, R.C. Chapter 1707. Thus, instead of creating a presumption as alleged by [petitioners], R.C. 1707.29 merely sets forth what the term knowledge encompasses for purposes of criminal liability under R.C. Ch. 1707." (Pet. App. A, p. 38.)

Ignoring the Ohio Supreme Court's interpretation, petitioners' assert that Ohio Rev. Code § 1707.29 is a presumption in aid of the definition of knowledge contained in Ohio Rev. Code § 2901.21(A)(2). This contention ignores the fact that the definition of knowledge contained in Title 29 of the Revised Code is inapplicable to prosecutions for securities violations, for which the Ohio Legislature created the special definition of knowledge set forth in Ohio Rev. Code § 1707.29. Neither the legislative history nor the case law suggests that knowledge of the type defined in Title 29 of the Revised Code is a required element of the securities offenses contained in Title 17 of the Revised Code.

While it may be true that a federal court cannot sustain an unconstitutional presumption on the ground that the legislature *might* have made it a crime to commit the basic act set forth in the presumption, *see Leary* v. *United States*, 395 U.S. 6, 37 (1969); *Tot* v. *United States*, 319 U.S. 463, 472 (1943), the legislature in Ohio *has* in fact made it a crime to commit a securities offense based upon a due diligence standard.[22] The definition of knowledge contained in Ohio Rev. Code § 1707.29 is thus clearly distinguishable from the statutory presumptions at issue in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), *Francis* v. *Franklin*, 471 U.S. 307 (1985) and *Carella* v. *California*, 491 U.S. 263 (1989). For instance, in *Sandstrom* and *Franklin* once the prosecution proved the predicate fact that the defendant killed the victim, the defendant was presumed to have done so intentionally. In *Carella*, once the prosecution proved that the defendant had failed to return the rental car within a specified number of days, the defendant was presumed to have intentionally withheld the vehicle. Unlike the foregoing cases, even after the prosecution proved the predicate fact that petitioners made false representations in selling securities, the prosecution still had to prove that the defendants in the exercise of reasonable diligence should have known of the falsity of these representations at the time the offenses were committed.

It is self-evident that a state may criminalize the making of misrepresentations in connection with the sale of worthless securities based upon a due diligence standard. Ohio's statute doing so does not raise any constitutional question worthy of review.

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[22] This fact distinguishes cases such as *Carella* v. *California*, 491 U.S. 263 (1989). The predicate facts that served as the bases for the presumptions in *Carella* had not been declared criminal, although the California legislature certainly could have done so without running afoul of the Constitution. Since the defendant in *Carella* was charged with grand theft, proof of the predicate facts alone could not constitute proof of the crime without the benefit of the illegal presumptions.

5. Even If The Definition Of Knowledge Contained In Ohio Rev. Code § 1707.29 Were Viewed As A Presumption, The Ohio Supreme Court Has Found That Any Such Error Would Be Harmless Beyond A Reasonable Doubt.

Petitioners contend that review should be granted to resolve the "tension" between the harmless error analysis pertaining to presumptions described in *Rose* v. *Clark*, 478 U.S. 520 (1986), and the approach described in Justice Scalia's concurrence in *Carella* v. *California*. Whether there is such a "tension" between *Rose* and *Carella*, as petitioners assert, is irrelevant. Petitioners were charged with three separate offenses under Ohio Rev. Code §§ 1707.44(B)(4), (G) and (J). Section 1707.44(J) required the jury to find that petitioners acted both "knowingly" (as defined by Ohio Rev. Code § 1707.29) and *with purpose to deceive*. Since the jury convicted both petitioners under § 1707.44(J) — which required a finding of a purpose to deceive — the jury necessarily found that the petitioners had actual knowledge of the falsity of the representations made to the debenture purchasers. The Ohio Supreme Court in addressing Warner's argument in this respect observed that "Warner's actions were shown to be calculated and deceitful." (Pet. App. A., p. 40.) As the Ohio Supreme Court held, any error in the instructions was "harmless beyond a reasonable doubt because the predicate facts conclusively established knowledge on the part of [petitioners], so that no rational juror could find that [petitioners] made the misrepresentations without the knowledge required by R.C. § 1707.44." (Pet. App. A, p. 40; *see also* Pet. App. B, p. 33.)

The petitioners cannot validly argue that the granting of certiorari in *Yates* v. *Evatt*, No. 89-7691, supports certiorari here. In a prior review of *Yates* this Court had already determined that an instruction that permitted the jury to presume malice from defendant's use of a deadly weapon constituted error under *Francis* v. *Franklin*, 471 U.S. 307 (1985). Unlike

the record before the state court in *Yates*, the jury in this case made a specific finding of intent to deceive on the part of both Warner and Schiebel. This finding necessarily included a finding that Warner and Schiebel actually knew that the representations they were making were false. Thus, on the facts of this case, any conceivable constitutional infirmity in the jury instructions given pursuant to Ohio Rev. Code § 1707.29 would be harmless beyond a reasonable doubt under both *Rose* v. *Clark* and *Carella* v. *California*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE A. KANE, JR.
Counsel of Record
SPECIAL PROSECUTOR FOR THE STATE OF OHIO

MARK A. VANDER LAAN
CARL J. STICH, JR.
KENNETH S. RESNICK
M. GABRIELLE HILS
Assistant Special Prosecutors

1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel for Respondent

OF COUNSEL:

JEROLD H. ISRAEL
2037 Winsted Boulevard
Ann Arbor, Michigan 48103

JOHN H. DOYLE, III
Anderson, Kill, Olick & Oshinsky
666 Third Avenue
New York, New York 10017

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No. 90-1314

IN THE

Supreme Court Of The United States

October Term, 1990

MARVIN L. WARNER and DAVID J. SCHIEBEL,
Petitioners,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF FOR THE PETITIONERS

ROGER J. MAKLEY
JANICE PAULUS
COOLIDGE, WALL,
WOMSLEY & LOMBARD
600 IBM Building
33 W. First Street
Dayton, Ohio 45402
(513) 223-8177

Attorneys for Petitioner
David J. Schiebel

LAWRENCE HERMAN
1659 N. High Street
Columbus, Ohio 43210
(614) 292-6691

LOUIS A. JACOBS
4905 Green Acres Drive
Columbus, Ohio 43220
(614) 459-5690

Of Counsel

HERBERT J. MILLER, JR.
WILLIAM H. JEFFRESS, JR.
(Counsel of Record)
JULIA E. GUTTMAN
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner
Marvin L. Warner

BOBBY LEE COOK
COOK & PALMOUR
128 South Commerce Street
Summerville, Georgia 30747
(404) 857-3421

Of Counsel

Balmar Legal Publishing Division, Washington, D.C. 20005 (202)659-3610

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INTRODUCTION

In view of the fact that two of the questions presented in this petition involve harmless error doctrine, it is more than usually important that the record on the merits of the case be fairly presented to this Court. The Brief in Opposition does not do so. In this Reply, we will not address statements by the respondent that are merely argumentative descriptions of its proof, but will attempt to correct those representations that have no support in the record or are directly relevant to the questions presented. We then reply briefly to some of the State's arguments on the merits of the petition.

REPLY TO RESPONDENT'S REPRESENTATIONS OF THE RECORD

1. The respondent asserts (p. 2) that $144 million of Home State funds were "illegally transferred to ESM." The assertion is baseless. No allegation has ever been made that Home State's investments at

ESM were illegal. The State did allege that $114 million in margin payments between May and October 1983 constituted misapplication of bank funds, but the petitioners were *acquitted* by the jury of all such charges. The $144 million claimed by the respondent to have been "lost when ESM went bankrupt" (p. 2) has in fact been largely recovered by Home State through litigation and other means, and all depositors and holders of so-called "worthless debentures" (*id.*) were paid in full.

2. In its Restatement of Questions Presented (p. i, No. 2) and in the brief (p. 18), the State mischaracterizes petitioners' claim as being that the defense was not "given copies" of written instructions "before they were handed to the jury." In fact, the defendants *were not even allowed to see* the written instructions, much less to receive copies, *either before or after they were given to the jury*. The instructions were disclosed to the defense for the first time after the *sentencing*.

3. The State asserts that the trial judge before oral argument "explain[ed] to counsel the instructions the court intended to give to the jury," and that the court "read[] its written set of instructions to the jury." (Brief in Opposition, p. 9.) In fact, a brief comparison of the written and oral instructions demonstrates that the judge did not read to the jury the instructions as supplied in writing. As for the explanation of the instructions given to counsel at the charge conference, a review of the transcript of that conference fully justifies the representations made to the court by counsel for Schiebel, Warner, and Bongard that after attempting to follow what the court was saying, they were left utterly confused. (T.p. 10988-89, 10996-97.) Their requests for a copy of the instructions were characterized by the judge as "a power play on your part to make me depart from my normal procedure, to never give the lawyers the charge." (T.p. 10989-90.) Just how seriously this affected the defense is illustrated by the fact that the judge specifically promised to include instructions on the good faith defense under the securities laws (t.p. 10994), and on the principle that when an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak (t.p. 10883). Those instructions, however, were not included in the notebook given to the jury. The omission triggered the sequence of events discussed in connection with the State's motion to correct the record over two years later.

4. Regarding the correction of the record, the State misrepresents the events concerning the supplemental instructions prepared in writing on the second day of deliberations (p. 10). What occurred was that Warner's counsel, without the knowledge or participation of Schiebel's counsel,[1] visited the judge that day in a renewed (but unsuccessful) effort to inspect the written instructions. At that time, counsel learned that the supplemental instructions had apparently not been included in the jury's book, and hastily attempted to recreate those instructions. They were reviewed with the prosecutors and submitted to the judge, who represented that he would add them to the jury's notebook.[2] The State is correct that petitioner Warner did not object to *this* procedure, but wrong in claiming that Warner knew the procedure would be to give the instructions "to [the] constable for delivery to the jury room." (Brief in Opposition, p. 10.)

5. In an effort to explain its delay in moving to correct the record, the State notes that the issue as to the missing instructions was raised on appeal when the petitioners' briefs were filed fifteen months after the verdict. The State then represents (p. 11): "Before the State could investigate and respond," the court of appeals "stayed the conviction appeal." Both statements are untrue. The petitioners' briefs were filed June 27, 1988, and the court's order was entered on August 10th. The order "stayed" nothing; it ordered the State to brief only the new trial issue, and "deferred pending further order of this Court" the "setting of the time for filing responses to the remaining assignments." There was never anything to hinder the State from filing a motion to correct the record at any time, and the State has never explained why it waited to do so for ten months after the petitioners raised the issue in their appellate briefs.

6. The State claims, both in the Restatement of Questions Presented (p. i, No. 3) and in its argument (pp. 9, 20-21), that the trial judge gave an "admonition prior to trial" that knowledge and intent

---

[1] The State's representation that Warner's counsel was "acting on behalf of all three defendants" (p. 10), is utterly unsupported by Warner's counsel, Schiebel's counsel, or anything in the record.

[2] In light of the factual dispute between the parties on this matter, we attach as Appendices A and B to this Reply the affidavits of the assistant special prosecutor and of Warner's counsel that were submitted to the trial court on the motion to correct the record.

were not elements of the unauthorized acts offense. That is simply not so. The week before trial, the trial judge did indicate — during the course of oral argument on the proper definition of the charged offenses — a view that intent to injure or defraud might be an element of misapplication but not of unauthorized acts.[3] The judge did not rule on that matter prior to trial, but more important, even the State conceded that the mens rea was *knowledge*, not recklessness. In oral argument, the prosecutor stated: "[T]he mens rea is knowingly . . . . So it's supplied, there has to be a knowing act on the part of the defendants." (T.p. 108.) Further, the State's proposed jury instructions submitted before trial specified the mens rea for unauthorized acts as "knowingly." (T.d. 166.) Not until January 26, 1987 — the day after the State rested its case — did the prosecutor contend that the requisite mens rea was recklessness (t.d. 301), and the judge did not rule on the issue until after the defense case was completed (t.p. 10652).

The State asserts (p. 21) that Warner did not "claim that he was surprised, prejudiced or otherwise taken unaware by this charge." The transcript of the initial charging conference reflects that Warner's counsel, addressing the misapplication counts, stated (t.p. 10682-83):

> I think we are changing, trying to change the law midstream after these people have already been indicted, after the trial has started. Indeed the court said before trial that to injure or intent to injure or defraud was going to be in the charge. I think in my opening statement we have used some of that language.
>
> We have relied on that. Even when the prosecutors believe that the statute require [sic] that element, it seems to me it is an unjustifiable denial of due process for us to be changing in midstream like this and eliminating an element of the offense.

In the same argument, the defense also specifically objected to the change from "knowingly" to "recklessly" on the unauthorized acts counts. (T.p. 10686-87.)

---

[3] Ultimately, the State reversed its position on the elements of misapplication as well, and the trial judge ruled that intent to injure or defraud was not an element of the misapplication offense, either. Because the petitioners were acquitted on all misapplication charges, that issue became moot.

7. In an apparent effort to convince this Court that in any event the proof established knowledge by Warner of the board of directors' resolution, the State represents that Warner "received copies of board reports" and "attended board meetings." (Brief in Opposition, p. 21; *see also* p. 6.) In fact, the record is unequivocal that the "board reports" did not reflect the collateralization limits voted by the board, and Warner did not attend any meeting at which the resolution was adopted or discussed. Warner's own testimony that he was unaware of the resolution (t.p. 10246) was uncontradicted.

REPLY TO RESPONDENT'S ARGUMENT ON THE MERITS OF THE PETITION

1. The issue presented to this Court with respect to Section 1707.29 of the Ohio Revised Code is not whether the Ohio legislature could have enacted a statute making it a crime to fail to exercise reasonable diligence in the sale of securities.[4] That is *not* what the Ohio legislature did. Instead, the legislature explicitly made knowledge the mental element of the securities offenses with which petitioners were charged and then provided that an accused "shall be deemed to have had knowledge" where in the exercise of reasonable diligence the accused "should have" secured such knowledge. *See* Ohio Rev. Code § 1707.29. The issue presented is whether, if a legislature elects to enact the latter statute, a court may avoid the requirement that the prosecution bear the burden of proof of every element of the offense by characterizing that statute as "in effect" a definition.

The distinction between making negligence an element of the offense and deeming knowledge established upon proof of simple negligence lies at the heart of the *Sandstrom* line of cases. This Court has always looked to the statutory language to determine whether a statute relieves the prosecution of its burden of proving each element of the offense beyond a reasonable doubt. *Compare Mullaney v.*

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[4] In *Lambert v. California*, 355 U.S. 225 (1957), cited by the State, this Court struck down a municipal ordinance requiring convicted felons to register with the police because the ordinance contained no element of willfulness. *Lambert* recognizes that the power to define criminal offenses without any element of scienter is not without limitation.

Wilbur, 421 U.S. 684 (1975), *with Patterson v. New York*, 432 U.S. 197 (1977). *See also McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

Petitioners do not rely on the title of Section 1707.29 for the conclusion that it operates to relieve the State of its burden of proof, but rather on the language of Section 1707.29 itself.[5] The word "deem" commonly means to "treat as if." *See Black's Law Dictionary* (5th ed. 1979). By its terms, Section 1707.29 relieves the State of the burden of proof beyond a reasonable doubt of every fact necessary to constitute the crime by providing that knowledge must be presumed (or deemed) established upon proof of the predicate fact of failure to exercise reasonable diligence. *See Sandstrom v. Montana*, 442 U.S. 510 (1979); *In re Winship*, 397 U.S. 358, 364 (1970).

Contrary to the State's assertions, moreover, Section 1707.29 has always been understood to create a presumption. It was held by the court of appeals below to create a presumption. (Pet. App. C, p. 56.) The same conclusion was reached in *State v. Trivedi*, 8 Ohio App. 3d 412, 414, 457 N.E.2d 868 (1982), cited by the State.[6] Even the State, until its brief in the Ohio Supreme Court, argued that Section 1707.29 was a presumption. In the trial court, for example, the State argued (t.d. 300, p. 4):

> [Section 1707.29] specifically provides for the use of a presumption of knowledge of facts . . . .
>
> Contrary to what defendants have alleged, the State does not contend that knowledge is not a necessary element of the crimes charged in Counts 83 through 87. Instead, it is the State's position that the jury should be instructed on the presumption of knowledge of facts contained in §1707.29 in connection with the knowledge element of each offense charged . . . .

---

[5] While the section headings do not constitute part of the law in Ohio, they do provide probative evidence of legislative purpose. *See State ex rel. Corrigan v. Barnes*, 3 Ohio App. 3d 40, 443 N.E.2d 1034, 1038 n.3 (1982). Moreover, the Ohio securities law contains a definitions provision, *see* Ohio Rev. Code § 1707.01, and the State does not explain why what it claims to be a "definition" was omitted from this section.

[6] *Trivedi* held that the presumption was constitutional because it was rebuttable. *Trivedi* was decided before *Francis v. Franklin*, 471 U.S. 307 (1985), and is inconsistent with it.

In the court of appeals the State argued that Section 1707.29 created a permissive inference rather than a mandatory presumption, but never contended that it was simply a definition. *See* Brief of Appellee State of Ohio at 79-85.

2. The State's assertion that the jury, with respect to one of the three securities counts, was instructed to find that Warner and Schiebel had actual knowledge of the falsity of the representations in the Offering Circular, misrepresents the record and appears in none of the opinions below. The instruction in Count 85 regarding purpose to deceive required the jury to find only that the defendants acted "knowingly" with respect to a false or misleading representation,[7] and the trial court again specifically instructed the jury as to the Section 1707.29 presumption "in regard to knowledge." (T.p. 11509.) A reasonable juror would not have understood the instruction as requiring a finding of a higher mens rea divorced from the unconstitutional presumption of knowledge.[8] This is especially true since the jury was also instructed in the initial portion of the charge that "[f]or the securities violations alleged in the indictment, the culpable mental state is knowingly." (T.p. 11470.)

---

[7] The jury was instructed (emphasis added)(t.p. 11509-10):

> To deceive in the phrase purpose to deceive means to *knowingly* deceive another or cause another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act or omission which creates, confirms, or perpetrates [sic] a false impression in another, including a false impression as to the law, value, state of mind or other objective or subjective fact.

Under the Model Penal Code, "[k]nowledge that the requisite external circumstances exist is a common element" of both purpose and knowledge. *See* Model Penal Code and Commentaries, Part I, p. 233. Thus, the unconstitutional instruction on the element of knowledge necessarily affected the jury's finding on the element of purpose.

[8] This Court has held that error in a jury charge can be cured only by language that actually explains "the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption." *Francis v. Franklin*, 471 U.S. 307, 315 (1985). Moreover, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.* at 322.

The State's attempt to rely on the instructions given with respect to Count 85 is especially ironic since the written instructions for this count, which were not made available to the defense until after trial, erroneously instructed the jury that "[i]n considering this count, you must consider [Ohio Rev. Code] 1707.29 which requires the defendants to exercise reasonable diligence to acquire knowledge they should have had in order to come to a good faith belief that the facts represented were true." (T.d. 415, p. 207.)

3. Although the State argues in a footnote that the Ohio Supreme Court evinced a clear understanding of this Court's harmless error standard, it does not even claim — except in the caption of its argument on p. 16 — that the court applied that standard to the constitutional error in refusing to disclose the written jury instructions to the defendants. Nor does the State attempt to explain how the test of harmlessness beyond a reasonable doubt can be satisfied when the Ohio Supreme Court's conclusion of "no prejudice" rested on acceptance of a constable's affidavit that supplemental written instructions were delivered, while refusing to consider jurors' affidavits that they were not, and upholding a "correction" of the record on an abuse-of-discretion standard. The State's argument seems, on this issue, to be one of waiver: that the petitioners' objection was merely to the *procedure* by which supplemental instructions were delivered, and no objection was made to that procedure.

As set forth earlier in this Reply, Warner was not advised of the manner in which the constable later claimed to have delivered the supplemental instructions, and thus had no opportunity to object. Schiebel was not even present or represented when the events occurred, and had no opportunity to object. Even more important, however, the State is incorrect in claiming that the issue is one of *procedure*. Both petitioners claim first and foremost that the supplemental instructions *never reached the jurors at all*. That this occurred was a direct result of the trial judge's adamant refusal to allow the defense to inspect the written instructions, in violation of their federal constitutional rights.

4. Petitioners' challenge to the rule of exclusive reliance on voir dire that has come to be applied by many lower courts does not seek to apply to state proceedings a heightened standard of protection

applicable only in federal courts enforcing federal criminal law. The question is whether this practice, which is found in both state and federal courts,[9] is sufficient to satisfy the minimum requirements of the Constitution where circumstances have created such a wave of public passion that jurors' claims of impartiality on voir dire are suspect. Although depositors ultimately lost none of their funds, their experience was described as a "nightmare" in one of many depositors' letters to the trial court. (T.d. 404, letter of Mark Stachler.)

Both the trial court and the Ohio Supreme Court unquestionably relied solely on the voir dire examination for their assessment of the effects of the prejudicial pretrial publicity (Pet. App. A, p. 25) and their determination as to the bias of potential jurors who had suffered the closing of their bank accounts. Contrary to the State's assertion (p. 15), however, not all three courts below "found the jury to be fair." The court of appeals reversed petitioners' convictions because it concluded, among other things, that the seating of a juror who had been denied access to her bank account denied petitioners their right to a jury composed of unbiased and unprejudiced jurors. That court concluded that Ms. Statt's "subjective protestations of impartiality cannot override the objective fact that she suffered direct and immediate economic deprivation which she perceived to be attributable to the collapse of Home State." (Pet. App. C, pp. 23-24.) The court of appeals also found error in the failure of the trial court to inform counsel that juror Dalton's mother-in-law had an account at Home State, where the court constable was informed of this information "within minutes of the verdict" (Pet. App. D, p. 7) and acknowledged that the existence of the mother-in-law's account could cause a mistrial. (Pet. App. D, p. 3.)[10] Each of these instances demonstrates

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[9] Indeed, petitioners cited a federal habeas proceeding as one example of this practice. *See Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986).

[10] The State introduced affidavits from Dalton, his wife and his mother-in-law which confirm that the mother-in-law mentioned her account to Dalton during the trial. In his affidavit, Dalton also admitted telling another juror that he "hated Marvin Warner" but claimed that this remark was made in jest. In light of the affidavits submitted by the State, it is difficult to fathom the State's reference to petitioners' "unprincipled attack" on juror Dalton, or its reference to the jurors' affidavits submitted by the defense as "dubious."

the inadequacy of voir dire in the circumstances of this case to protect fully the petitioners' right to an impartial jury.

Respectfully submitted,

ROGER J. MAKLEY
JANICE PAULUS
COOLIDGE, WALL,
WOMSLEY & LOMBARD
600 IBM Building
33 W. First Street
Dayton, Ohio 45402
(513) 223-8177

Attorneys for Petitioner
David J. Schiebel

LAWRENCE HERMAN
1659 N. High Street
Columbus, Ohio 43210
(614) 292-6691

LOUIS A. JACOBS
4905 Green Acres Drive
Columbus, Ohio 43220
(614) 459-5690

Of Counsel

HERBERT J. MILLER, JR.
WILLIAM H. JEFFRESS, JR.
(Counsel of Record)
JULIA E. GUTTMAN
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner
Marvin L. Warner

BOBBY LEE COOK
COOK & PALMOUR
128 South Commerce Street
Summerville, Georgia 30747
(404) 857-3421

Of Counsel

April 1991

APPENDIX A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	Case No. B854622
	:	(Judge Ruehlman)
v.	:	
	:	
MARVIN L. WARNER, et al.	:	
	:	
Defendants.	:	

AFFIDAVIT OF WILLIAM H. JEFFRESS, JR.

DISTRICT OF COLUMBIA, ss:

WILLIAM H. JEFFRESS, JR., being duly sworn upon oath, deposes and says as follows:

1. I was one of the attorneys for the defendant Marvin L. Warner during the trial of this action which resulted in a jury verdict on March 2, 1987.

2. On February 20, 1987, Judge Niehaus instructed the jury in open court. He appeared to be reading from a set of written instructions. Defense counsel had requested, before oral argument, to be given a copy of the written instructions but Judge Niehaus refused the request.

3. In a chambers conference following the oral instructions, I objected to the omission of several instructions, as did counsel for the State and for other defendants, as reflected at pp. 11527-535 of the transcript. Judge Niehaus then returned to open court and further instructed the jury as reflected in pp. 11535-539 of the transcript. The jury then retired to deliberate for an hour or so that evening, and returned to continue deliberations on Saturday morning, February 21.

4. Overnight, I discussed with other defense counsel the problem of our not knowing what was contained in the written instructions given to the jury, and we determined to see Judge Niehaus the next day in another effort to inspect or obtain a copy of those instructions. That morning, co-counsel Tom Miller and I, along with an assistant special prosecutor who I believe to have been Lawrence Elleman, visited Judge Niehaus's chambers. I asked the judge whether we could now see the written instructions and he declined, saying the jury had the only copy. There followed a discussion of whether the judge's corrections and additions made in open court had been included in the written version given to them. I do not remember all the details of this discussion, but do recall that as a result of the conversation, a number of instructions were typed by the court reporter from proposals submitted by the parties, reviewed and edited by counsel, discussed with Judge Niehaus, and agreed upon. Mr. Elleman was present in chambers when this occurred. Judge Niehaus then left the room with the instructions in hand, saying he would add them to the jury's book. I did not see these additional instructions again and do not have a copy of them. To the best of my knowledge, no copies were made.

5. I have reviewed the copies of instructions attached to the affidavit of Mr. Elleman in this matter, which appear to be those typed by the court reporter on the morning of February 21. I do not believe these versions are identical to what Judge Niehaus agreed to add to the jury's book, as I recall that changes were made in what was typed by the court reporter before they were agreed upon.

6. I have reviewed paragraph 5 of the affidavit of Brenda Sellmyer dated April 24, 1989, submitted in this matter by the State. I do not recall any time when Mr. Miller, Mr. Donnellon and myself left Judge Niehaus's chambers carrying any instructions, nor do I recall Mr. Miller and myself ever being in Judge Niehaus's chambers without the presence of someone from the Special Prosecutor's office. I categorically state that when Mr. Elleman, myself and others met in chambers with the judge and agreed on the form of the instructions, Judge Niehaus then and there took the instructions personally and exited into the corridor alone, without leaving copies with me or Mr. Miller.

7. On February 25, while the jury continued deliberating with a set of instructions defense counsel had not seen, all defendants filed a formal motion asking the Court to produce to us a copy of the written instructions actually given to the jury. The Court took no action on this motion and no copy was provided to us.

8. On the day of sentencing, in the course of arguing Mr. Warner's motion for a new trial, I pointed out that we were not in a position to say whether the written instructions differed from the oral instructions because we had not seen the written instructions. Judge Niehaus responded (T.p. 11593):

> THE COURT: They have been part of the record from the beginning with the court reporter, gentlemen. It was not my obligation to copy and give them to you, Mr. Miller ought to know that, he practices locally.
>
> MR. JEFFRESS: If they are part of the record, that is fine.
>
> THE COURT: They are as I have always proceeded, and made them a copy of the record through the court reporter. They have always been there.

Before making these comments, Judge Niehaus had apparently examined the notebook used by the jury during the deliberations. During an appearance on a radio talk show the night of the verdict, Judge Niehaus stated: "I gave them a 250 page charge in writing, that they could refer to. I saw it today and it's quite dog-eared." (Defendant Marvin Warner's Motion for a New Trial, Exh. B, p. 6.)

9. After Judge Niehaus's comment on the day of sentencing, I requested my partner, Seth Waxman, to locate the instructions and if possible to obtain a copy of them. Within a day or two after the sentencing, he provided me with a copy of the instructions supplied to him by the court reporter. I reviewed them and noted numerous differences between the written instructions and those given orally. I also noticed numerous handwritten alterations in the typed instructions. I also noticed that the pages appeared out of the order in which they were numbered.

10. In order to check the accuracy of what Mr. Waxman had given me, I visited Barbara Smith, the court reporter, who showed me a black looseleaf notebook which she represented to be the instructions

provided to the jury. I compared the contents of the notebook to the copy given me by Mr. Waxman, page by page, and found them to be in all respects identical. The additional instructions given to Judge Niehaus on February 21 were not included.

11. Based on my review of the instructions, I had serious questions as to when and by whom the handwritten additions had been made, and whether the set provided us by the court reporter was complete. In a telephone interview of the jury foreman, Herman Cooper, on April 8, 1987, I inquired about the instructions and he said all the instructions were contained in a black notebook. He further said that some of the pages had handwriting on them when received, but he could not say without looking at them which pages did and which did not. At my request, he agreed to examine a copy of the instructions and review them with me. I caused a complete copy of the instructions from the black notebook to be delivered to Mr. Cooper's home on April 9, and I spoke to Mr. Cooper again by telephone on April 10 after he had reviewed them. The memorandum attached hereto, which I wrote the same day I talked to Mr. Cooper, accurately summarizes what he told me. Mr. Cooper was firm in his statement that no instructions were brought to the jury room after its deliberations began, and that the jury had no instructions other than those in the black book. Accordingly, I requested my co-counsel Robert Hastings to have the court reporter file the book of instructions in the record for purposes of the appeal, and he did so.

12. On May 1, 1989, I attempted to reach Herman Cooper by telephone and was told that he died on March 27. I then attempted to contact most of the other jurors, and succeeded in reaching five of them. Each of these jurors — Rita Lafkas, John Brady, Albert Stuck, Beth Statt and Elmer Mathes —advised me that they were not aware of any instructions other than those contained in the black notebook, and do not recall any being brought to the jury room by Mr. Donnellon or anyone else after the deliberations began.

/S/
William H. Jeffress, Jr.

Subscribed and sworn to before
me this 5th day of May, 1989.

/S/
Notary Public

[ATTACHMENT]

MEMORANDUM

TO: File

FROM: WHJ

DATE: April 10, 1987

SUBJECT: Information supplied by Herman Cooper regarding jury instructions

---

In response to my letter of April 9 transmitting a copy of the written jury instructions, Herman Cooper telephoned me today and said his recollection as to changes is refreshed by examining them. I went through the instructions page-by-page with him and he stated as follows:

P. 3: The lines were added by Cooper.

P. 5: The marks before and after the "inference" instruction were added by Cooper.

P. 9: Change was on original

P. 9A: Same

P. 21: Same

P. 19 Same

P. 12: The handwritten additions were on the original. However, the arrow was added by Cooper to show that the instruction carried over. Cooper stated he was certain that the handwritten words were on the instructions he had before him, even when I told him that other jurors recall they were not there.

P. 24: Change was definitely on the original provided to him.

P. 15: Change was on original

P. 29: Same

P. 20: The words "or criminal conduct" were on the original. He does not recall the x's over the top paragraph, but he cannot be absolutely certain whether they were or were not there.

P. 22: Change was on original

P. 38: Cooper says that in the instructions provided to him "Burton M. Bongard" on line 11 was typed as "Burton L. Bongard." He circled the "L" and wrote about it "M", in pencil. He notes that on the copy I supplied him, his markings have been erased and the "M" has been typed in; he can spot it because the "M" is out of line with the rest of the typed characters. He says this also occurred on pages 81, 89, 137, 141, 152, and 169, he believes.

P. 49: Cooper made the change in the date. He points out that the manner in which this change is made, is the same manner in which he changed the "L" to "M".

P. 198: Change was on original. Same for pages 201, 205, 209, 210, 216, 219, 220 and 221.

Cooper additionally said the handwritten changes on the original were in blue ink. His changes were in pencil.

With respect to "good faith," Cooper said that he had *only* the instructions in the book. Nobody brought any supplemental instructions to him, and the only papers he had other than the book were the verdict forms and the exhibit indexes. (I did not, when talking to him, have a copy of the good faith language from the transcript and thus did not read it to him; but Cooper was certain there were no pages of instructions given to him other than th se in the copy I supplied.)

APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	Case No. B854622
	:	(J. Ruehlman)
vs.	:	
	:	
MARVIN L. WARNER, et al.,	:	AFFIDAVIT OF LAWRENCE R. ELLEMAN
	:	
Defendants.	:	

* * * *

AFFIDAVIT OF LAWRENCE R. ELLEMAN

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Lawrence R. Elleman, being duly cautioned and sworn, states as follows:

1. I am an attorney at law and have served as an Assistant Special Prosecutor for the State of Ohio since April 1985. I was one of the trial prosecutors in the prosecution of Marvin L. Warner, Burton M. Bongard and David J. Schiebel and participated in the conferences and discussions between counsel and the Court regarding jury instructions.

2. On the afternoon of Friday, February 20, 1987, Judge Niehaus delivered the instructions to the jury. Earlier in the week, Judge Niehaus had taken briefs and heard oral argument with respect to proposed instructions. Following the Court's reading of the instructions, all counsel convened in chambers with Judge Niehaus at which time he entertained objections pursuant to Crim. R. 30(A). At that time, it was agreed that several additional instructions would be read

to the jury. At the conclusion of the conference, the jury was further instructed.

3. By the completion of the instructions, it was late in the afternoon. The jury met only briefly before it was dismissed for the night.

4. The following morning, Saturday, February 21, 1987, I recall further discussions regarding typed versions of the additional instructions. In reviewing miscellaneous papers from the trial, I found in one of my files copies of several typed instructions the originals of which I believe were among those delivered to the jury. The handwriting on one of the instructions is mine; I recall writing that during discussions with Mr. Jeffress.

Further affiant sayeth naught.

/S/ _____
Lawrence R. Elleman

Sworn to and subscribed in my presence this 25th day of April, 1989.

/S/ _____
Notary Public

[ATTACHMENT]

INSTRUCTION 21

During agrument [sic], you heard considerable discussion as to motives and actions of other persons. If they acted improperly, charges could be brought against them. The only persons on trial here are the defendants and the sole purpose of this proceeding is to determine whether the defendants are guilty or not guilty. It is not to determine guilt or innocence of other persons on other charges. However, in weighing the testimony, as the court has told you before, you may consider their motives as going to the weight of their testimony, but we are only trying the case of these defendants.

* * * *

INSTRUCTION 9

Under Ohio law, a savings and loan association may invest any of its funds in bonds or interest bearing obligations of the United States, or for which the faith and credit of the United States are pledged for the payment of principal and interest. Furthermore, savings and loan associations are permitted to invest any of their funds in obligations issued or fully guaranteed as to principal and interest by agencies such as the Government National Mortgage Association. [The next sentence appears in handwriting in the original:] However, this section does not permit an unauthorized action not permitted by the Board of Directors nor does it permit a wilful misapplication of funds.

* * * *

INSTRUCTION 17

If the defendant had good faith belief in the existence of the facts represented and acted in accordance with the facts as he believed them to be, he is not guilty of selling securities fraudulently, as knowledge is an essential element of that crime.